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CHARLES ELMOR

No. 580, 581, 582

In the Supreme Court of the United States

October Term, 1933

ELIAS A. OLSON, *Petitioner,*

vs.

UNITED STATES OF AMERICA

RANDOR G. KARLSON, *Petitioner,*

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HARRY BREWSTER, *Petitioner,*

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Brief of the Government of Canada

(Appearing pursuant to the provisions of the Protocol Accompanying Convention to Regulate the Level of the Lake of the Woods; signed at Washington the 24th February, 1925.)

OTTAWA
J. O. PATENAUDE
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
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BRIEF OF THE GOVERNMENT OF CANADA

(Appearing pursuant to the provisions of the Protocol Accompanying Convention to Regulate the Level of the Lake of the Woods; signed at Washington the 24th February, 1925.)

OPINIONS BELOW

No opinion was rendered by the District Court. The charge to the jury appears at R. page 126. The opinion of the Circuit Court of Appeals appears at R. pages 417 to 429. The dissenting opinion appears at R. pages 429 to 439. The opinions are reported in 67 F. (2d.) 24.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 21, 1933 (R. 439-440). The petition for certiorari was filed November 10, 1933, and granted December 11, 1933, pursuant to the provisions of Section 240 (*a*) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions presented may be best expressed in the language of the Circuit Court of Appeals (R. 419):

> But one main issue is involved in these appeals. It is raised in the record in various ways—by exclusion of evidence, refusal to charge and the charge to the jury. The issue is whether the use of these properties for flowage purposes is such a use as, *under the circumstances here,* can be considered as an element of that value for which compensation must be made. (Italics ours.)

If the evidence was rightly excluded no complaint could be made with reference to the charge. The question presented therefore is essentially this: Was testimony of potential utility of petitioner's tracts of land to water-power development admissible as evidence of its value under the circumstances of this case?

TREATIES AND STATUTES INVOLVED

Convention of 1925 between the United States and Dominion of Canada, 44 Stat. Pt. 3, p. 2108;

Treaty of 1909 between the United States and His Britannic Majesty in respect of the Dominion of Canada, 36 Stat. Pt. 2, p. 2448;

Act of May 22, 1926, c. 364, 44 Stat. 617, as amended by Act of April 18, 1928, c. 379, 45 Stat. 431.

Pertinent parts of the treaties and statutes as amended are set forth in the Appendix.

STATEMENT OF THE CASE

This is an appeal from the judgment of the United States Circuit Court of Appeals, Eighth Circuit, confirming the judgment of the United States District Court for the District of Minnesota, Honourable John B. Sanborn, Judge, in a proceeding brought by the United States to establish, by condemnation, its right to overflow the petitioner's land, in the fulfilment of a treaty concluded at Washington between the United States and Canada, the 24th February, 1925, for the regulation of the level of the Lake of the Woods (Lake of the Woods Convention proclaimed the 17th July, 1925, 44 Stat. (Part III) 2108).

The proceedings in the Circuit Court of Appeals were heard by Stone and Booth, Circuit Judges, and Wyman, District Judge. The opinion of the Court was delivered by Stone, Circuit Judge, the conclusion being that the judgments must be and are affirmed. Booth, Circuit Judge, dissented and filed an opinion to the effect that the judgment should be reversed.

By the second article of the Protocol Accompanying Convention to Regulate the Level of the Lake of the Woods, of even date, both in signature and proclamation, with the Convention (44 Stat. (Part III) 2108), it was provided that the Government of Canada should be given the privilege of representation by counsel in the proceedings for the acquisition of the flowage easements.

The objects of the Convention and Protocol are set forth in Article 2 of the former instrument, which reads as follows:—

> "The level of Lake of the Woods shall be regulated to the extent and in the manner provided for in the present Convention, with the object of securing to the inhabitants of Canada and the United States the most advantageous use of the waters thereof and of the waters flowing into and from the lake on each side of the boundary between

the two countries for domestic and sanitary purposes, for navigation purposes, for fishing purposes, and for power, irrigation and reclamation purposes."

The flowage easements, including those which are the subject matter of these appeals, are being acquired in order to carry out these objects.

Accordingly, the Government of Canada, being jointly interested with the United States in the fulfilment of the objects of the Convention, and availing itself of the privilege accorded by the second article of the Protocol, desires to make certain submissions regarding the issues in this appeal.

The issue as stated in the United States brief, is:—

"Was the testimony of potential utility of petitioner's tract to water-power development admissible as evidence under the circumstances of this case?"

The circumstances include the special Canadian and international aspects of the problem, and it will be submitted that a consideration of these aspects will clearly establish a position in which the alleged utility of petitioner's lands to water-power development could not, in accordance with well established principles of law, be considered in estimating compensation.

In order to appreciate the circumstances of this case, it is necessary to commence with an outline of the historical background out of which the proceedings have arisen.

The Lake of the Woods is a large body of water, partly in the State of Minnesota, and partly in Canada. The surface area of the lake is approximately 1,500 square miles, and its shoreline is approximately 2,225 miles, of which 140 miles are in Minnesota and 2,085 miles are in Canada. The outlets of the lake are in Canada. They drain into the Winnipeg River, which flows in a northwesterly direction. The various economic interests that were dependent upon the lake made some measure of con-

trol desirable, and for about forty-five years, there has been control at the outlets. This commenced with purely national control by Canadian agencies, and, subsequently, control by Canadian agencies in which the United States took an active interest. It culminated in the international regime established by the Convention to Regulate the Level of the Lake of the Woods (44 Stat. (P. III) 2108), whereby the lake levels are regulated, in order to secure to the inhabitants of both countries the most advantageous use of the waters of the lake, for navigation purposes, for fishing purposes, and for power, irrigation, and reclamation purposes.

The first structure, built to exercise a measure of control over the lake levels, was Rollerway Dam which was built in 1887-88 by private interests, with the assistance of the Dominion of Canada, in aid primarily of navigation, and secondarily to maintain a constant head of water for the mills located at the outlets. This dam when first constructed raised the level of the lake about three feet, but a few years later it fell into disrepair and the effect was reduced to an increase in level of one and one-half feet. This condition resulted in a project for the construction of Norman Dam (Final Report of the International Joint Commission, pp. 16-17; Exhibit No. 71; v. R. 278; Appendix F, infra p. 122).

Note—This Report was admitted in evidence, but by reason of its bulk, it was not printed in the Record, and accordingly, for the convenience of the Court, relevant excerpts are set forth in the Appendix. (R. 278.)

Norman Dam was built by the Keewatin Power Company in 1893-95, and, from the name of the company, a misunderstanding has arisen. It has been assumed that Norman Dam was operated and maintained for power purposes. This assumption is not justified by the record or by the facts. Norman Dam was built by the company,

but was never used by the company as a completed structure. Without stop logs the dam could not appreciably affect water levels. The stop logs were not placed in the dam until 1898, and then, only under a contract with the Crown, represented in this matter by the Commissioner of Public Works of the Province of Ontario, whereby the dam was to be controlled and operated by the Crown, through the Commissioner, *in the interest of navigation.* The company covenanted that the Commissioner should have the right to regulate the height of the water and to control the dam as might be necessary (R. 237). The history of this matter is recounted in the Final Report of the International Joint Commission, referred to above. It appears from this report that the only effect of Norman Dam was to maintain the level of the waters of the lake at normal summer levels *in the interests of navigation,* a matter in which the Government of the United States was equally concerned. It should, however, be observed that the regularization of the summer levels in the interest of navigation tended to produce an equalization of flow and, in the case of the power plants at the outlets of the Lake of the Woods, a small increase in head. Consequently, the control designed to promote the interest of navigation, produced incidental benefits to power. After the lake had been brought completely under international control by the Convention, in 1925, the new Norman Dam, which was built in 1924-26, to replace the old structure, was used to regulate levels in the interests of power as well as navigation; the protection of the power interests having been brought into the scheme by the operation of the Lake of the Woods Convention.

With regard to the exercise of control of lake levels through the utilization of Norman Dam, the matter was regulated entirely by the Crown acting through the Com-

missioner of Public Works of the Province of Ontario from 1898 until 1919. In the latter year the Government of Canada and the Government of the Province of Ontario joined in placing the regulation of the levels of the Lake of the Woods under the Lake of the Woods Control Board consisting of four qualified civil engineers, two to represent the Dominion of Canada and two to represent the Province of Ontario. (R. 237; 238).

It was the duty of the Control Board to regulate the lake and maintain the levels as nearly as might be between 1056 and 1061, which is substantially the same type of regulation as that which was subsequently established by the Convention, and the regulation was required to be in the interests of navigation, power and other interests, both on the lake and on the river below.

To sanction this scheme for a joint control, "concurrent legislation" was enacted, the Dominion Statute being entitled "The Lake of the Woods Control Board Act, 1921," and the Ontario Statute being entitled, "The Lake of the Woods Control Board Act, 1922." The two Acts conveyed to the Board the combined authority of the Dominion and Province.

The "concurrent legislation" was held in abeyance for the time being and the Lake of the Woods Regulation Act, 1921, was enacted by the Parliament of Canada (R. 240). The effect of this statute was to place the works in question, including Norman Dam, under the exclusive legislative authority of the Parliament of Canada and, accordingly, the Lake of the Woods Control Board was reconstituted by appropriate action (R. 242).

The Board thus reconstituted, continued to exert complete control over the levels and outflow of the lake, until 1928. In that year, the Dominion of Canada and the Province of Ontario, with the concurrence of the Prov-

ince of Manitoba, entered into an agreement providing for the simultaneous repeal of the Lake of the Woods Regulation Act, 1921, and the bringing into force in the place thereof of the "concurrent legislation" referred to above. The Lake of the Woods Control Board was reappointed so as to enable it to operate under the "concurrent legislation." (R. 243; 238-240; 244).

Meanwhile the international aspect of the regulation of the level of the lake had gradually come into prominence. In 1902 the development of navigation, and, particularly, the improvement of Warroad Harbour, became active in the United States. This emphasized the need for comparatively high and dependable summer levels in the lake, and in May, 1905, the Government of the United States formally suggested to the Government of the Dominion of Canada that Norman Dam be so operated as to prevent the level of the Lake of the Woods from falling below the datum of 7·2 on the Warroad gauge, i.e. 1060·8 sea-level datum. It was found that it would be impossible to maintain a minimum stage of 7·2, as requested, during low water, without constructing a dam in the eastern outlet of the lake; but this conclusion was not officially communicated to the Government of the United States. It is, however, noteworthy that the object of the regulation as carried on by the Commissioner of Public Works of Ontario was the maintenance of summer levels in the interest of navigation, the same matter with which the United States Government was concerned. The only representations made by the United States Government to the Government of Canada in this period, indicated that the Government of the United States was equally desirous of securing the maintenance of these levels in the interests of navigation. The United States Government did not make any diplomatic repre-

sentations protesting against the action of the Canadian governmental authorities in thus regulating the levels of the lake. On the contrary, the only diplomatic action taken was to urge the maintenance of even higher levels, and the action of the Canadian authorities in maintaining the levels established at Norman Dam in the interest of navigation, can appropriately be regarded as action meeting with the full approval and concurrence of the United States Government. (Appendix, infra p. 124.)

The International aspect became more active after the conclusion of the Boundary Waters Treaty, 1909. The two Governments, by identical letters of reference, in 1912, referred to the International Joint Commission for examination and report, the question of securing "the most advantageous use of the waters of the Lake of the Woods and of the waters flowing into and from the lake on each side of the boundary for domestic and sanitary purposes, for navigation and transportation purposes, for fishing purposes, and for power and irrigation purposes, and also in order to secure the most advantageous use of the shores and harbours of the lake and of the waters flowing into and from the lake . . ." (R. 258, 259).

After a long and intensive study of the questions referred—extending over a period of four years and including eight public hearings—the Commission submitted its Final Report to the two Governments, on the 12th June, 1917. The Final Report, to which reference has already been made, set forth definite recommendations as to the regulation of the lake level and as to the outflow from the lake. (Appendix F; infra p. 125). The principles embodied in the recommendations were accepted by the two Governments, by an exchange of notes, early in 1919 (v. R. 258).

The Lake of the Woods Convention embodied the recommendations of the International Joint Commission in the form of a treaty between the two countries, signed on the 24th February, 1925, and subsequently ratified. Accordingly, the regime of control and regulation, after a period of investigation and study, became completely international in its character.

This regime involved the interference with the natural levels of the lake and consequently the flowage of lands in the United States bordering thereon. Article VIII provided that a flowage easement should be permitted up to elevation 1064 sea-level datum and that the United States should assume all liability to the owners of the land bordering on the lake in the United States for the cost of such easements. Article X provided for the apportionment of costs of the undertakings of the United States under Article VIII (which included the cost of the acquisition of flowage easements) the Government of Canada paying to the Government of the United States the sum of $275,000, together with one-half of the excess of such cost over that sum.

Appropriate legislation was enacted by Congress (Act of May 22, 1926, 44 Stat. 617, as amended by the Act of April 18, 1928, 45 Stat. 431), in which the Secretary of War was required to acquire, by purchase or condemnation, " flowage easements up to elevation 1064 sea-level datum upon all lands in such State bordering on the Lake of the Woods, Warroad River and Rainy River, . . . "

Being unable to secure these flowage rights on various tracts of lands by purchase, a condemnation proceeding was instituted, in which was included lands owned by the present petitioners.

Proceedings were commenced by a petition in Condemnation Proceedings, dated the 18th July, 1928 (R. 2-6). The petition was amended by order of the District Court of the United States for the District of Minnesota,

Sixth Division (R. 6-7), and the amended petition is set forth in the Record (R. 7-11). Commissioners were appointed and the time and place of their first meeting fixed by order of the Court, dated the 25th September, 1928. (R.11-12). The Commissioners made their report and award on the 4th May, 1929 (R. 13-14). The Commissioners awarded the sum of $3,660 in respect of Karlson's lands; and the sum of $1,296.50, in respect of Olson's lands; and the sums of $640.70 and $3,195.80 respectively (or $3,836.50 in all), in respect of Brewster's lands.

Both the United States of America and the landowners, namely Karlson, Olson and Brewster appealed from these awards (R. 15-20). The United States of America complained that the awards were excessive and the landowners complained that they were grossly inadequate.

The appeals took the form of trials before the Court, Hon. John B. Sanborn, District Judge presiding, and a jury. They were tried together in the City of St. Paul, the trial commencing on the 22nd January, 1931 (R. 21).

Upon the trial the petitioner offered evidence which is described in the bill of exceptions as testimony " as to the power resources on the Winnipeg River and the relation of the Lake of the Woods thereto " (R. 24). The respondent objected to the introduction of any evidence purporting to show that the value of petitioner's land was enhanced by virtue of its availability as one of many necessary units in the execution of any comprehensive plan to increase the storage capacity of Lake of the Woods. This objection was sustained, but as inquiries of a similar nature (power resources on Winnipeg River and relation of Lake of the Woods thereto) (R. 34) were continued, the respondent moved the Court (R. 136) for leave to offer testimony out of order for the purpose of laying a foundation for objection to the admission of any evidence of that character. This motion was allowed (R.

136), and the respondent then laid before the court all of the physical characteristics of the lake, the multiplicity of titles in the governments and citizens of the United States and Canada, Minnesota, Manitoba and Ontario (and of forty bands of Indians in Canada), the laws and treaties governing the use of the waters of the lake, the conflict of interests, public and private, in the use of these waters, and the necessity of reconciling these interests to a regimen of levels that would accomplish the greatest aggregate benefit to all, and submitted this evidence together with other proof hereinafter noted, as an absolute bar to any influence upon the value of petitioner's land due to the fact that it was physically adapted to form a part of a storage reservoir. The Court then ruled (R. 27) that evidence of enhanced value of petitioner's land by reason of its adaptability to reservoir uses and of the benefits that such use might yield in the development of power at various natural sites on the Winnipeg River should not be considered by the jury as an element of value in arriving at the damages to which the landowner was entitled.

To perfect the record on this issue the petitioner made offers of proof all directed to the subject matter first raised, namely " power resources on the Winnipeg River and the relation of the Lake of the Woods thereto " (R. 24, 27-83). The testimony proposed in these offers of proof was excluded by the Court. It was conceded by petitioner's counsel (R. 162) that " the facts which are offered to be proved do not bear upon the question of any other value except the value of the flowage easements and the reservoir value of the property."

The issue thus raised was whether testimony of potential utility of the petitioner's lands to water-power development was admissible as evidence of its value under the special circumstances of this case.

The cases were tried, with the evidence as to special adaptability excluded, and verdicts and judgments were entered on the 13th February, 1931 (R. 134-135). The amounts of the awards by the Commissioners, the amounts claimed by the petitioners, and the verdicts of the jury are indicated by the following table:—

Name of Landowner	*Amount of Award*	*Amount Claimed*	*Verdict of the jury and Judgment*
Karlson	$ 3,600 00	$ 8,000 00	$ 880 00
Olson	1,296 50	3,000 00	490 00
Brewster	640 00 3,195 00	2,000 00 7,000 00	900 00

The petitioners being dissatisfied with the amounts awarded by the verdicts and judgments, appealed to the United States Circuit Court of Appeals, Eighth Circuit, and ultimately to the Supreme Court of the United States of America.

ARGUMENT

Upon the facts just summarized, the question presented for decision may be stated more specifically than was possible at the beginning of this brief. It is a two-fold question and may be thus expressed:—

(1) *Was there at any time, and by any possibility whatever, a market in which flowage easements could be sold on the basis of their value for reservoir purposes?*

The Government of Canada confidently submits that there was not.

(2) *Even if such a market was a theoretical possibility, was not that possibility too remote and uncertain to be submitted to the jury as an element of value?*

The Government of Canada with equal confidence submits that it was.

These two aspects of the question involved will now be examined seriatim.

I.

THERE NEVER WAS AND NEVER COULD HAVE BEEN ANY PURCHASER OF EASEMENTS FOR RESERVOIR USE EXCEPT THE EXPROPRIATING AUTHORITY

A fallacy lurks in the "special adaptability" theory of market value when applied to the facts of this case. The fallacy consists in assuming, in the face of opposing facts, the existence of private purchasers in whose estimation the availability of the lands for reservoir use would have constituted an element of commercial value. This assumption, once made, becomes the basis for the plausible argument which is reflected in the dissenting opinion of Judge Booth in the Circuit Court of Appeals. If there were a market (so the argument goes) and if Olson, Karlson and Brewster might have resorted to it, then it would be unjust not to award them a corresponding benefit.

That there was at no time a market for the flowage easements becomes clear when the facts are reviewed.

The basic fact is that only in Canada could the dam be erected which was essential to the creation of a reservoir. In Canada it could be erected only by Governmental action or by an agency to which Governmental authority was given.

Before the original flowage the fact of the physical adaptability of the lands in question for reservoir use was, of course, demonstrable. It was a mere matter of topography. At that time, however, no private person or group would have given value for flowage easements with a view to reservoir use. This results inevitably from the circumstance that any private person or group contemplating reservoir development would necessarily

have been in one of two positions: either hopeful of obtaining governmental authority or actually in possession of it. In the former event, mere hopefulness of obtaining a grant would not have justified a large investment in flowage easements, for disappointment would have meant ruin. Moreover even if Canadian governmental authority was assured or had actually been obtained, purchase of easements in the United States would have been unnecessary; for in that event the only recourse of American landowners would have been against Canada through such a treaty as in the instant case was in fact made. When, therefore, in 1887 the Rollerway Dam was built with Canadian governmental authority and the lands of the petitioners were flowed, no damage was done which could by any possibility be measured in terms of any other value than that inherent in land useful for ordinary agricultural or riparian development.

This being true in 1887, it was true likewise when in 1898 the Norman Dam was substituted for the Rollerway Dam by the co-operation of the Province of Ontario with the Keewatin Power Co. Had the lands in suit been dry at that time, the considerations above outlined would have required the conclusion that there was in 1898 no element of reservoir value for which anybody would pay a cent. The fact that the lands were actually submerged, to the extent that the Rollerway Dam had raised the lake level, gave them no other element of value than that which they would have had if dry. As nobody would have given reservoir value for the lands before they were flowed, so nobody would have given such value after they were submerged.

If there was in 1887 no market for flowage easements measured otherwise than in terms of the ordinary taking of agricultural land; and if the same thing was true in

1898, nothing that subsequently occurred could create the special value which was non-existent at the outset. The Treaty of 1909 was by its terms inapplicable to cases of flowage that had already arisen and to those covered by special agreement (infra, p. 104); and the Lake of the Woods situation had existed for years and was later covered specifically by the Lake of the Woods Convention, 1925. Even if applicable, the Treaty of 1909 created no elements of market value and threw no light upon the problem now before the Court.

Nor did the Convention of 1925 give to flowage easements upon the lands in suit any element of market value not already possessed by them. The Convention merely recognized the justice of paying to American landowners damages for the injury theretofore done them by flowage and the value of which they would in future be deprived by its continuance. The doing of justice in both these ways was assumed by the United States and Canada through machinery to be set up and operated by the former. An Act of Congress was accordingly passed providing for the ascertainment of and payment for past damage; and this must be assumed to be an adequate provision. (Act of May 22, 1926, as amended by the Act of April 18, 1928; Appendix infra, pp. 118 to 121.) To compensate for the future maintenance of the Treaty-level the United States undertook to exercise the power of eminent domain; and it is the proceeding, thus undertaken, that is now before the Court. In other words, under the provisions of the Act of Congress above referred to passed pursuant to the Convention of 1925, a fundamental difference was recognized between past damage and future appropriation. As to the former, the Secretary of War was authorized to make an inquiry; provision being made for due notice and opportunity for hearing and for a report to Congress of

the amounts found to be equitably due to the claimants. With respect to the appropriation of easements for future flowage, the method of determining compensation was entirely different. The proper governmental authorities were instructed by Congress to begin a proceeding for condemnation in the usual form and therefore the considerations which could enter into a determination of compensation were such only as are relevant in a judicial proceeding.

While, therefore, the United States by treaty undertook to follow both the two courses above outlined, nothing in the Convention requires the United States to pay to landowners anything more than the fair market value of the right to be acquired; and this, for the reasons above given, means such sum as is ascertainable without reference to an imaginary reservoir use. The verdict of the jury in the instant cases settles what this sum is.

It is, of course, true that from the time that the Treaty of 1909 was made, the local atmosphere has been surcharged with speculation. The expectation that sometime or other the United States or Canada or both would almost certainly pay something to the landowners necessarily led to speculation as to what such governmental payments would be. This condition became acute after the Report of the International Joint Commission was filed in 1917, foreshadowing as it did the Convention of 1925. But speculation respecting what possibly could be gotten from expropriating governments is not an element of market value recoverable in a judicial proceeding. There is in fact no limit to speculation in such cases; and this is well illustrated by what has happened in the three cases before the Court.

The petitioner Randor G. Karlson, on August 10, 1921, acquired from Alfred F. Green about 123 acres.

The consideration mentioned in the deed was $1.00 (R. 221, et seq.). He testified that he had altogether 160 acres (R. 99). He offered to prove that he bought this land because it was valuable for storage and flowage purposes (ibid.); that he paid a higher price for this reason (R. 100); that he purchased the 120 acre lot at a sacrifice sale (ibid.) from his brother-in-law Green who had paid $175 (R. 103); that the fair market value of the flowage easement was $44,000 (R. 101); that after the land was overflowed it was worthless (R. 102). The Commissioners had awarded him $3,600. He appealed, and, in the Notice of Appeal to the District Court, his counsel presented his claim for only $8,000, instead of $44,000 (R. 17). When the case came on for trial, the speculative estimates of value had undergone another change, and counsel offered to prove a value of $9,400. (R. 55). The jury awarded him $880 (R. 134).

The petitioner Harry Brewster on February 14, 1923, acquired from L. H. Harrison about 160 acres. The consideration named in the deed was $1,500 (R. 215). Apparently he got altogether 220 acres (R. 95). He offered to prove that he bought the 160 acres solely because it was reputed to have a storage and reservoir value (R. 94) and that the value and fair market price of the easement was $60,000 (R. 95). He testified that after the submersion the land below contour 1064 was valueless (ibid.). The Commissioners had awarded him $3,835. He appealed, and, in the Notice of Appeal to the District Court, his counsel presented his claim for only $9,000, instead of $60,000 (R. 18-20). At the trial the estimates again changed and counsel offered to prove a new value of $13,300 (R. 55). The jury awarded him $900 (R. 135).

The petitioner Elias A. Olson made entry May 8, 1923 (R. 167 et seq.). He testified that he was born in

Sweden, had worked there on dam construction and learned there the value of lands for reservoir purposes (R. 96). He offered to prove that he learned there that lands used for flowage and storage purposes had an additional value (ibid.); that before filing for entry he went to Canada and saw some of the dams and hydro-electric plants involved in this case (R. 96-97) and he filed because of this high value (R. 97) and that the value of the easement was $16,000 (R. 98). He had 56 acres and the submerged land had no value (R. 98). The Commissioners had awarded him $1,296.50. He appealed, and, in the Notice of Appeal to the District Court—doubtless under restraint exercised by his counsel—he claimed only $3,500, instead of $16,000 (R. 17-18). By the time the case had come on for trial he had evidently regretted the restraint exercised in drafting the Notice of Appeal and an offer of proof for a new value of $10,800 was made (R. 55). The jury awarded him $490 (R. 134).

These three petitioners, having bought for speculative purposes and having had visions of $44,000, $60,000 and $16,000, respectively, (which under the advice of counsel they modified to $8,000, $9,000 and $3,500, respectively) were naturally dissatisfied with the Commissioners' awards of $3,600, $3,835 and $1,296.50. Having appealed to the jury and having been allowed by the jury only $880, $900 and $490, respectively, they are naturally still more disappointed. But it does not appear that they paid much for their lands. They bought as a speculation—to see what they could collect from Canada or the United States. Apart from such speculation, there was no evidence as to any real market. But a vendor and vendee cannot, by placing a high speculative value (or any speculative value) upon what it is hoped can be recovered from the United States, thereby fix the amount which the United States must pay.

In the light of the foregoing considerations, it is respectfully suggested that the so-called special availability value of the lands in suit has no relation to any value inherent in the lands themselves but is merely a high-sounding name by which to describe the speculative possibility that large but uncertain sums of money could at some time and in some way be secured from the expropriating governments. If this view is accepted by the Court an affirmance of the judgment appealed from will be a necessary consequence.

II.

THE OBSTACLES IN THE WAY OF RESERVOIR CONSTRUCTION BY PRIVATE ENTERPRISE MADE THE POSSIBILITY OF A RESERVOIR USE OF THE LANDS TOO REMOTE AND UNCERTAIN TO CONSTITUTE AN ELEMENT OF VALUE

If the facts do not, in the judgment of this Court, exclude all possibility of such a market as that for which the petitioners contend, it is respectfully submitted that such a possibility was so remote that its submission to the jury would have been merely an invitation to speculate at the expense of the Government of the United States.

Under this general proposition certain subordinate matters require consideration.

1. The Principles of Law governing the recognition of special adaptability of lands as an element of damage.

The basis upon which compensation for lands taken should be assessed, alike in the English, Canadian and United States law, is their value to the owner at the time of the taking, and not their subsequent or potential value to the taker. The reason for this rule is that the power of eminent domain is granted in order to carry out a public purpose in the interest of the public. It interferes with the rights of the owners of property, and provides for just compensation in order to indemnify them against their loss. The owners are precluded from receiving, as compensation, the added value which results from the exercise of the power and is intended to accrue to the public and in which they share as members of the public. The test is not, what the public authority taking the

land will gain by carrying out the project, but what the person from whom it is taken will lose by having it taken from him. (*Cripps on Compensation*, 5th Ed. p. 102; *Secretary of State* v. *Charlesworth*, L.R. (1901) A.C. 373; *City and South London Railway* v. *St. Mary Woolroth*, L.R. (1905) A.C. 1; *Cedars Rapids Power Co.* v. *Lacoste*, L.R. (1914) A.C. 569; and cases cited at 11 L.R.A. (N.S.) 996).

The attention of the Court is invited to the discussion of the legal principles in the leading English and Canadian cases, which should be helpful in determining this question. Reference will also be made to the leading United States decisions, which establish the principles governing this appeal.

A.

Discussion of the legal principles of special adaptability by the English Courts.

The law adopted by the English Courts in regard to special adaptability is set out with great clearness by Lord Moulton in *In re Lucas and Chesterfield Gas and Water Board*, L.R. (1909) 1 K.B. 16, and his exposition of this branch of the law of compensation has been accepted and approved in more recent cases by both the Privy Council and the House of Lords. The facts of this case are briefly as follows. The Chesterfield Gas and Water Board was incorporated by a special Act of Parliament and was given authority in 1904 by a further Act of Parliament to construct a storage reservoir at a site possessing peculiar natural advantages for that purpose, both on account of the general configuration of the land and the character of the underlying strata. The land on one side of the valley site belonged to a Mr. Lucas and on the other side to the Duke of Devonshire.

Notice to treat was accordingly served by the Board and an umpire appointed to determine the compensation. Appeal was taken from the umpire's award to the King's Bench Division and thence to the Court of Appeal. The pertinent parts of Lord Moulton's judgment in the Court of Appeal are as follows:—

"The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. *The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses.* Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him.

"At a very early date in the history of this branch of the law there arose what is known as the question of 'special adaptability.' The phrase is not a happy one, for special adaptability for some purpose or other is the very basis of the market value of all land, except, perhaps, land that in all respects falls below the average. In agricultural land extra fertility, in town lands advantages of site, are true cases of special adaptability for farming or building purposes. These tend so directly to increase both the value and the market price of lands in the hands of a private owner that it has never been doubted that he could urge them in augmentation of the compensation which he was entitled to receive. The question has arisen only in the cases where the special adaptability is for purposes for which lands are required only when used for works of public utility, which are naturally different from the uses to which lands are put while in private hands, and which therefore do not necessarily influence the price which such lands command in the market.

"Ought the owner to be entitled to higher compensation by reason of the, to him, useless peculiarities which the lands possess? No better example of the problem could be found than that which we have in the present case. The land in question is by its position and conformation marked out as a favourable site for an impounding reservoir to collect water for the public supply of a district. The peculiarities which make it suitable for that purpose add nothing to its value as agricultural or grazing land, which I will assume to be the only alternative uses. A public authority obtains powers to take it for a reservoir; ought it to pay any higher price than is represented by its agricultural or grazing value? Is not any price in excess of this a violation of the canon that you are only to give that which represents its worth to the seller, and that you are to disregard all questions of its worth to the buyer?

"The decided cases seem to me to have hit upon the correct solution of this problem. To my mind they lay down the principle that *where the special value exists only for the particular purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the lands to be purchased under it.* But when the special value exists also for other possible purchasers, so that there is, so to speak, a market, real though limited, in which that special value goes towards fixing the market price, the owner is entitled to have this element of value taken into consideration, just as he would be entitled to have the fertility or the aspect of a piece of land capable of being used for agricultural purposes." (Pp. 29, 30 and 31.) (Italics ours.)

It is obvious that the lands surrounding the Lake of the Woods fall within the first of the two categories set out above by Lord Moulton, just as the lands belonging to Mr. Lucas in the case just cited fall within the second category.

The distinction is clearly evident and is well illustrated by contrasting the position of the lands surrounding the Lake of the Woods with those acquired from Mr. Lucas. The Lake of the Woods is an international body

of water and its use as a storage reservoir is dependent upon international agreement. The lands in Minnesota are to be acquired in pursuance of treaty obligations and only the United States has authority to acquire them in that way. There is thus no open market, however limited, in which the Lake of the Woods could be acquired for storage purposes; it is essentially a matter to be dealt with by the United States and Canada alone.

The lands acquired from Mr. Lucas, on the other hand, besides being specially adapted for reservoir purposes, were situated within a reasonable distance of several large urban centres, any one of which might quite conceivably have obtained parliamentary powers of purchase. To quote Lord Moulton again:—(page 31)

> "Although a large reservoir is not a need that ordinarily occurs in the experience of individuals, yet it is a recognized and often occurring need in the experience of the community, and in a densely populated country like England it may well happen that some out of the way tract of land suitable by its position and conformation to be formed into a reservoir is capable of being useful in this way to more than one locality, and may thus be the subject of competition between them, and may thus command in the market a corresponding price."

In the case of the Lake of the Woods, this element of a competitive market is necessarily lacking, hence, no compensation should be paid to the landowners in Minnesota on account of special adaptability for reservoir purposes.

A further quotation from Lord Moulton's judgment makes this view still clearer; referring to the fact that the situation and conformation of the land in question was such that it might readily be foreseen that it would sooner or later be used for reservoir purposes, as is also the case with the Lake of the Woods, he says: (p. 35).

> "The scheme which authorizes the new reservoir only entitles the owner of the land to receive as compensation

the value of the land unenhanced by that scheme, and, unless its situation and peculiarities create a market for it as a reservoir site for which other possible bidders exist, *I do not think that the single possible purchaser that has obtained parliamentary powers can be made to pay a price based on special suitability merely by reason of the fact that it was easy to foresee that the situation of the land would lead to compulsory powers being some day obtained to purchase it.* No element of that which economists term 'value in use' can, in my opinion, increase compensation, unless it is either a 'value in use' to the seller or a 'value in use' to persons other than the proposed purchaser so as to introduce the element of competition as a factor in fixing price." (Italics ours.)

B.

Discussion of the Legal Principles of Special Adaptability by the Canadian Courts.

The principles of land valuation in a proceeding somewhat similar to the present one, and the application of special adaptability are thus described in the leading Canadian case on this subject, namely, *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste,* L.R. (1914) A.C. 569, decided by the Judicial Committee of the Privy Council, the final court of appeal,—

"For the present purpose it may be sufficient to state two brief propositions:—(1) the value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

"Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking, (though adaptability, as pointed out by Fletcher Moulton, L.J. in the case cited,"—i.e. the Chesterfield case quoted above—" is really rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is

> merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.". (At p. 576.)

Market value is the governing factor; and where there is no market for the feature of special adaptability, attaching to the land in question, that feature cannot be given consideration in estimating the market value.

The same cause was again before the Privy Council quite recently on a second appeal from the award of the arbitrators and the principles set out above were again affirmed.

> "The real question to be investigated was, for what would these . . . subjects have been sold had they been put up to auction without the Cedars Power Company being in existence with its acquired powers, but with the possibility of that or any other company coming into existence and obtaining powers." (*Lacoste v. Cedars Rapids Power Company*, (1928) 2 D.L.R. 1, at p. 5 (quoting and affirming Lord Dunedin's statement. L.R. (1914) A.C. 569, at p. 579).

A further difference arises from the fact, which will be developed later in this brief, that the use of the shores of the Lake of the Woods for a reservoir was, and is, entirely dependent upon the obtaining of governmental approval and authority, not only from the Government of the United States, but also from the Government of Canada and other governmental and international authorities. It has been decided by the Canadian Courts that the necessity for obtaining governmental consent or approval is a very important factor in assessing compensation. When a claim is based upon adaptability for a special purpose and the use of the lands in question for that special purpose is dependent upon obtaining governmental approval or consent, the hope or expecta-

tion of obtaining that consent cannot be an element in the valuation of lands acquired by eminent domain.

This was decided in *Rex* v. *Wilson* (1914), 15 Exchequer Court Reports, p. 283. In that case Sir Walter Cassels said—

> "The market value of the water lot is the proper basis for the assessment of compensation, but where that value may be enhanced by the hope or expectation of obtaining authority to erect structures on the lot, where there is no evidence of market value to guide it, the Court will not assess compensation on a hope or expectation which cannot be regarded as a right of property in the defendant."

Later at page 289, he says,—

> "To make the property fully available there must be an approval, and the title to erect on the water lot would not be complete until such consent had been procured."

That case was followed by the Court of Appeal of Ontario *In re Snow and the City of Toronto,* 56 O.L.R., p. 100. See the judgment of Ferguson, J.A., on page 108, in which he quotes Sir Walter Cassels in *Rex* v. *Wilson,* pages 290 and 291, as follows:—

> "In the case before me . . . there is no obligation on the part of the Crown to approve of the construction of works. At the time of the expropriation no such right had been obtained; and if the authorities I have quoted are correctly decided, it would seem to me that this hope of obtaining such approval could not be an element within the meaning of our statute."

Mr. Justice Ferguson goes on to say:—

> "The reasoning of the judgment of Sir Walter Cassells appeals to me as sound, and appears to establish that, if the market value has been enhanced by a hope or expectation, the claimant is entitled to the market value, but that the hope, expectation, or chance of obtaining from the Crown, in the right of the Province, power to fill in the water lots or to interfere with the rights of riparian owners or of obtaining from the Dominion of Canada authority to obstruct navigation by the filling in and building upon the water lots is not an element of value that the arbitrator may take into consideration.

"The principles enunciated in the Wilson case seem to accord with the views adopted by the Supreme Court of Canada in *Canadian Northern Railway Co.* v. *Billings*, 31 D.L.R., 687."

The claim is based upon use for reservoir purposes and it should be noted that the lands in question cannot be used for reservoir purposes without the consent of the Government of the United States, the authority which is expropriating the flowage easements in this instance. The allowance of the petitioners' claim would involve the valuation of the prospect of their getting the consent of the Government of the United States to the use for reservoir purposes. The Court of Appeal of Manitoba, in a case involving similar principles, has decided that such a prospect cannot be taken into account in arriving at the value of property expropriated for public purposes.

In *McNichol* v. *Winnipeg*, 12 M.R., p. 305, a case in which the City of Winnipeg was acquiring property for street extension purposes, it was decided that, in fixing the value of the land taken by the city, the land must be treated as undivided land and not as subdivided, because in the subdivision of the land the consent of the city to such subdivision and the approval by it of the plan is necessary, and therefore the value of the land cannot be taken to be enhanced by the prospect or possibility of, or its adaptability for, subdividing in a certain way. At page 308 the Chief Justice of the Court of Appeal states:—

"As above mentioned a subdivision will greatly enhance the value of the plaintiff's land, but the right to subdivision and the placing of streets which the City must take care of and for which they are responsible is subject to their control and so the plaintiff must lay out the streets by the consent of the City or must leave his land unsubdivided."

C.

Statement of the Legal Principles of Special Adaptability by the United States Courts.

The general principles on which compensation for lands acquired by eminent domain are based appear to be substantially the same in the United States as in the English and Canadian law.

> "The requirement of the Fifth Amendment is satisfied when the owner is paid for what is taken from him. The question is what has the owner lost, and not what has the taker gained." *Boston Chamber of Commerce* v. *Boston*, 217 U.S. at 194. See also *Kerr* v. *Park Commrs.*, 117 U.S. 379, and *Shoemaker* v. *U.S.* 147 U.S. 282.

In the United States, the weight of authority sustains the same principle as is followed by the English courts.

> "Some cases say that the owner is entitled to the value of the property for the highest and best use to which it is adapted. This is true in so far as such adaptation affects the market value. But the proper inquiry is, not what is the value of the property for the particular use, but what it is worth in the market, in view of its adaptation for that and other uses. *Lewis on Eminent Domain*, 3rd Edition, par. 706.
>
> "Some of the cases hold that its value for a particular use may be proved, but the proper inquiry is, what is its market value in view of any use to which it may be applied and of all the uses to which it is adapted?" *Lewis on Eminent Domain*, 3rd Edition, par. 707.

Market value is the governing factor; and where there is no market for the feature of special adaptability, attaching to the land in question, that feature cannot be given consideration in estimating the market value.

This point is clearly shown by the following extract from *Nichols on Eminent Domain*, Second Edition, Vol. 1 at p. 671:—

> "Inasmuch as the compensation awarded when land is taken by eminent domain is the market value of the land for any use to which it is adapted and for which it is avail-

able, if it appears that the land is especially adapted and available for some public use, even if it be the very use for which it was taken, and that such adaptability and availability adds to its market value, this feature must be taken into consideration.....

"The very purpose of reserving in the people the power of eminent domain is to prevent the owner of a site especially available for a public work, but not of great value for other purposes, from trading upon the necessities of the public when it is sought to acquire his land for public use, and from compelling the public to pay for his land whatever figure he may name, and it seems clear that the owner has no such power. Consequently the market value of land peculiarly adapted for public use is its value apart from such adaptability, plus such sum as a purchaser would have added to that value by reason of the chance that the land might be required for public use and that in such case, to avoid the expense and dangers of litigation, the public agency requiring it would pay rather more than its value for other purposes, and whether as a matter of justice or public policy the land-owner is entitled even to this increment is a matter of doubt. If the use upon which such enhanced value depends requires the acquisition of numerous other parcels owned by other persons, the chance that the land will be acquired otherwise than by eminent domain is too remote to be considered. While these principles may not have been universally recognized, they have been set forth in recent cases of unquestioned authority and the soundness of the reasoning cannot be disputed."

These views are supported by *McGovern* v. *New York*, 229 U.S. 363, 46 L.R.A. (N.S.) 391. *New York* v. *Sage*, 239 U.S. 57. *Sargent* v. *Merrimac*, 196 Mass. 171, 81 N.E. 170. See also XXIX Harvard Law Review 428.

The views of the Supreme Court on this subject are very clearly expressed in *City of New York* v. *Sage*, 239 U.S. 57. This case arose through the action of the City of New York in acquiring by power of eminent domain the lands required for the Ashokan reservoir site in connection with an augmentation of the city's water supply. Commissioners were appointed to determine the com-

pensation payable to the various land-owners and Sage was by them allowed " the sum of $7,624.45 for land and buildings and the further sum of $4,324.45 for reservoir availability and adaptability."

The city appealed from this award and the case eventually reached the Supreme Court, the appeal being allowed as regards the sum awarded for availability and adaptability. The following extract gives the reasons for this decision:—

> " The decisions appear to us to have made the principles plain. No doubt when this class of questions first arose it was said in a general way that adaptability to the purpose for which the land could be used most profitably was to be considered; and that is true. But it is to be considered only so far as the public would have considered it if the land had been offered for sale in the absence of the City's exercise of the power of eminent domain. The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price. But what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact—not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with other lots. The City is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain.
>
> " Any rise in value before the taking, not caused by the expectation of that event, is to be allowed, but we repeat, it must be a rise in what a purchaser might be expected to give." (239 U.S. at p. 61.)

In the proceedings now before this Court, in which there are between fifteen hundred and sixteen hundred separate parcels of privately owned land involved, the chance that an interest in them all to the extent of a

flowage easement could be acquired otherwise than by eminent domain is certainly too remote to be considered.

In *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, the Supreme Court laid down the following rules:—

> (1) An owner of upland bordering on a navigable water which is taken under condemnation by the Government for the purpose of navigation is entitled to compensation for the fair value of the property, but he is not entitled to probable advanced value by reason of a contemplated improvement.
>
> (2) The owner of a separate parcel is not entitled to additional value resulting as a part of a comprehensive scheme of improvement requiring the taking of his and other property.
>
> (3) "Strategic value" cannot be allowed in condemnation proceedings: the value to the Government for a particular use is not the criterion. The owner is compensated when he is allowed full market value.

The decision of this Court in *Boom Company* v. *Patterson*, 98 U.S. 403 (1878) is particularly illuminating. That was a case in which a riparian landowner was the owner also of three adjacent islands in the Mississippi River, so situated that they were specially fitted, in connection with the nearest bank of the river, to form a boom of extensive dimensions. All that was required to form a boom, a mile in length and one-eighth of a mile in width, was to connect the islands with each other and the lower end of the island furthest down the river with the nearest bank. The project of so utilizing these islands was one which the owner himself could have undertaken and he was free to confer his rights on others. Even had the State been minded to create a monopoly for the use of the Mississippi or to give exclusive control and management of logs floating on it, such action would have been beyond its constitutional power. Obviously the adaptability of the islands for boom pur-

poses was a circumstance which the owner had a right to insist upon as an element in estimating the value of his lands when the Boom Company undertook to exercise its power of eminent domain. To this effect was the decision of this Court. Obviously, also, the facts of the case are in significant contrast with the facts of the instant case. There the landowner was possessed of property which had large commercial potentialities and there was no obstacle in the way of realizing them. Here the landowners could do nothing with their land except use it or sell it for agricultural or other similar uses. They are precisely in the position in which the landowner in the Boom Company case would have been if the company had been given a valid monopoly of the right to construct the boom.

That this is a sound analysis of a decision relied upon by the landowners in the Court below sufficiently appears from the comment upon it made in *United States* v. *Seufert Bros.*, 78 Fed. Rep. 520 (1897).

This latter case was a proceeding by the United States Government to condemn a right of way for a portage boat railway along the Columbia river. The judgment states:—

> "This evidence,"—i.e., as to the special availability for railroad purposes of the land taken—"was not admitted because I was of the opinion that, in estimating the value of land taken for a public use, its value for such use is not to be considered. The decision of the Supreme Court in *Boom Co.* v. *Patterson*, 98 U.S. 403 was thought not to apply to the case on trial, since the question of value there considered had regard to existing business wants, of which the owner might avail himself either on his own account or for general use. The use for which condemnation was sought in that case was for the construction of log booms in the Mississippi river adjacent to the lands condemned. The owner might use his land for this purpose on his own or on public account. The use was not necessarily a public

one, and required no public licence, so long as the navigation of the river was not obstructed. There is therefore no reason why the adaptability of the lands condemned for boom purposes was not a proper element to be considered in estimating the value of such lands. . . . .

"The claim that the extent of the private interest to be taken is to include, in addition to all the uses available to the owner, the value, if that is possible of attainment, of the public interest to be served, is in my opinion without equity, and against public policy." (At pp. 520, 521.)

The same view is held in *Five Tracts of Land* v. *U.S.*, 101 Fed. Rep. 661, where it was held that in the case of land acquired by the United States for a national park, the fact that the land is desired by the United States for a particular purpose is not an element of market value.

It should also be noted that, in all the cases cited above, the land was being taken outright and the owner was consequently to be paid the full market value. The present circumstances differ in this respect, that the land is not to be acquired outright; no transfer of title is to take place, the Government is merely to acquire an interest in the land to the extent of the right to flood that land to a maximum height of 1062·5 feet and to pay all damages caused by the water reaching that height, not continuously held at that level but fluctuating to lower levels from time to time. This circumstance, however, does not affect the principle, which relates solely to the question whether adaptability for a special use can be considered in the measurement of compensation.

D.

Conclusions.

It is submitted that the decisions cited establish definite principles of law, which should govern the issues in this appeal.

Special adaptability for reservoir use can only be considered if the special use is one that is valuable to the owner. It must be available to the owner in one of two ways: He must be able to use the lands for reservoir purposes himself; or else there must be some person, or persons—other than the expropriating authority—who could have acquired his land or a flowage easement therein and used it in conjunction with other lands or easements, for reservoir purposes.

If the owner can show that he could have, as a matter of legal and practical possibility, used his lands, together with the other necessary lands or easements, for reservoir purposes, he is entitled to compensation on that basis.

If, in the alternative, the owner can show that, as a matter of legal and practical possibility, some other person could have acquired the easement and the other necessary lands or easements, in order to establish and maintain a storage reservoir, the owner would be entitled to compensation on the basis of special adaptability; because such possible acquisition by the purchaser or purchasers in question would be an element in market value for which he should be compensated.

On the other hand, it will be shown that, in the circumstances of this case, the lands could not be used for reservoir purposes, either by the owners or by any other persons. The use for such purposes, by any person other than the governments of the two countries acting conjointly and exercising the power of eminent domain, would be legally and practically impossible, and could not be regarded as an element affecting market value or the measure of compensation, either directly or indirectly. To attribute reservoir value to these lands or easements would be to grant participation to the

owners, in economic values which did not exist at the date of the taking, and which are created for the first time as a result of the joint governmental action, and the exercise of eminent domain in furtherance of the joint project. Such a course would run contrary to the principles underlying the decisions which have been cited from the United States, Canadian and English Courts.

2. The specific application to the facts of this case of the Principles of Law above summarized.

The offers of proof rejected by the Trial Judge related to the power resources of the Winnipeg River and the relation of the Lake of the Woods to such resources. Their character is illustrated by the offers of proof by witness Adolph F. Meyer (R. 27-40). The proof so offered would have established the great value of the Lake of the Woods as a storage reservoir and that, in the absence of the treaty, power interests would have sought to acquire flowage rights and easements in order to establish such a reservoir.

The basic fallacy involved in the offers of proof, is that they assume that it would have been feasible to establish a storage reservoir. It would have been legally and practically impossible for any private interest to establish a storage reservoir in the Lake of the Woods. The only manner in which such a reservoir could be established is by the co-operation of the governments of the two countries utilizing the various national and international agencies and authorities, including the exercise of the power of eminent domain by the Government of the United States.

In order to appreciate the legal and practical impossibility of establishing a storage reservoir in any other manner, the position of a private enterprise seeking to

accomplish such an object—either for the purpose of improving its own water-powers or of selling additional water to the Winnipeg River interests—may be considered. The private enterprise, having acquired flowage rights over the petitioners' lands, could not utilize the lake for storage purposes. In order to do so, the enterprise would be compelled to acquire flowage rights over all riparian lands in the lake, and obtain the necessary consents from all governmental authorities: state and federal, provincial and dominion, and international, who were concerned in the matter. The obstacles that must be surmounted by such a private enterprise, in the circumstances of this case, may be presented under nine headings, which are lettered for the purpose of convenient reference.

A.

The multiplicity of titles made it impracticable to unite the privately owned lands bordering on the lake for reservoir purposes, in any way save by eminent domain.

The following basic data are submitted indicating the nature of the shore line of the lake and of the islands in the lake, and showing the state of the title of the lands subjected to the flowage easement on the Canadian side—

(1) The approximate shorelines of the Lake of the Woods and of the islands in the lake are,—

	Miles
(*a*) Total in Canada and the United States.	some 2,225
(*b*) Total in Canada.	some 2,085
Total in United States.	some 140

Statement by I. R. Strome re shore line of Lake of the Woods. R. 223-234.

(2) The total acreage in Canada between elevations 1059 and 1064, as taken from page 61 of the Final Report of the International Joint Commission as of date May 18, 1917,—

	Acres
Privately owned and filed on	3,408
Province of Ontario	13,043
Dominion (Manitoba)	14,427
Indian Reserves	8,652
Total	39,530

Final Report of International Joint Commission, May 18, 1917, p. 61; U.S. Government Exhibit No. 71; R. 278.

(3) The number of parcels of land held by private parties,—

(a) In Ontario as of November 30, 1920 . . . . . at least 723

(*b*) In Manitoba 0

Letter from L. V. Rorke to J. T. Johnston, Dec. 3, 1929, R. 225.

Statement by W. S. Gliddon in re lands granted in Manitoba, R. 227.

The very large number of private land titles on the Canadian side, exceeding 723 in number, presents a situation precisely corresponding with that dealt with by the Supreme Court of the United States in the *City of New York* vs. *Sage*, 239 U.S. 57. This situation, accentuated by the very large number of private owners of land on the United States shore of the lake, presents a state of affairs in which the union of the lots, using the words of Mr. Justice Holmes, "*would not have been practicable or have been attempted, except by the intervention of eminent domain.*" (239 U.S. at p. 61.) (Italics supplied.) The lake could not have been

legally constituted as a storage reservoir without the acquisition of flowage easements in respect to all of these outstanding titles, and it is clear that the possibility of acquiring them without the power of eminent domain is a contingency too remote to be considered as an element in estimating compensation.

B.

The ownership of a large part of the shore lands by the Province of Ontario made it impracticable for the land owners, or any persons other than the two Governments acting conjointly, to constitute a storage reservoir.

The ownership of a large part of the lands bordering on the Lake of the Woods, by the Province of Ontario, would have made it wholly impracticable for power interests in Manitoba, or for any other persons, legally, to constitute a storage reservoir. The Lake of the Woods could not be used for reservoir purposes without acquiring flowage rights in respect of these lands owned by the Province.

The shoreline of the Lake of the Woods bordering on the lake in Ontario approximates to some 2,050 miles as determined by scale from standard published maps; also the total acreage in Ontario between elevation 1059 and elevation 1064 is some 13,043 acres (supra p. 40).

This land with the exception of that portion incorporated in Indian Reserves, is wholly under the jurisdiction of the Province of Ontario, the larger part being Crown Lands owned by the Province. The Province of Ontario would have jealously protected the rights of the Province and the rights of the citizens of the province who were interested in the levels of the lake.

The major interests include:—

(1) The Lake of the Woods Milling Company with its power operated mills (Mill "C" established

in 1881 and Mill "A" established in 1887) in the Keewatin Outlet of Lake of the Woods, operating under water rights granted by the Ontario Government.

(2) The Town of Kenora's municipal plant, constructed 1892 (afterwards purchased by the Keewatin Power Company) located on the Eastern Outlet of Lake of the Woods, operating under water rights granted by the Ontario Government.

(3) The Keewatin Power Company's power plant at the Norman Dam, constructed in 1926, operating under water rights granted by the Ontario Government.

NOTE.—The increased discharge capacity from the lake necessary to the securing of the power storage range involved a decrease in the available power head at these three plants on the outlets of the Lake of the Woods.

(4) Lumbering interests operating on the lake which are best served by a high and uniform level and whose operations are based upon limits leased from the Ontario Government.

(5) Fishing interests operating on the lake which are advantageously served by a uniform level and whose operations are based upon licences issued by the Provincial Government.

(6) Foreshore properties owned or leased by Ontario citizens, who are most advantageously served by levels dependent upon their respective individual needs.

The petitioner's case is based upon the possibility of the petitioner, or some other person, particularly the Winnipeg Power interests, acquiring flowage rights in respect to the entire foreshore of the Lake of the Woods, so

as to be able to augment the power development of the river by regulating the Lake of the Woods levels. This would be entirely dependent upon the acquisition of flowage rights in respect to the Ontario Crown Lands. In view of the numerous and outstanding Provincial interests located around the Lake of the Woods, and wholly or largely dependent upon the levels of the lake for their well-being, it is inconceivable that, as a practical matter, the Ontario Government would have granted these rights in aid of a power development in another province. As a practical matter, it would have been impossible for the Winnipeg Power interests to have secured rights to a storage range on the Lake of the Woods to be used for the benefit of water-powers in the Province of Manitoba and this difficulty alone would have made it out of the question for these power interests to have undertaken to secure flowage rights in the United States or elsewhere along the lake shore.

C.

The shorelands were subject to four (five since the transfer of the resources to Manitoba) separate governmental jurisdictions, three of which are in Canada, namely, the Dominion, Ontario and Manitoba.

The fact that the lands bordering on the Lake of the Woods were subject to four (five since July 15, 1930) separate governmental jurisdictions with differing administrative policies, and each with its own particular interests to guard, rendered it impracticable for private power interests, on the Winnipeg River, in Manitoba, to have secured the flowage easements necessary to have permitted the use of the lake as a storage reservoir for power purposes in the interests of power development in Manitoba.

The Governmental jurisdictions within which the lands bordering on the Lake of the Woods in Canada fall, are recorded hereunder:—

(1) The Crown Lands bordering on the Lake of the Woods in Manitoba were administered by the Dominion Government from 1867 to the 15th July, 1930, from which date the administrative control passed to the Province of Manitoba;

(2) The Crown Lands bordering on the Lake of the Woods in Ontario have been continuously under the administrative control of the Province throughout;

(3) The Indian Reserves bordering on the Lake (some forty in number), have been under the administrative control of the Dominion Government throughout;

(4) In addition to the control over lands, the Dominion of Canada, throughout, has had exclusive power with relation to beacons, buoys, lighthouses, navigation and shipping, inland fisheries, interprovincial and international ferries, and international affairs.

These propositions are established by the following documentary evidence, set forth in the record, United States Exhibit No. 62, Division V of Canada's representation; extracts from pertinent Acts:—

1. *The British North America Act, 1867 (Imperial)* R. 230.
2. *The Manitoba Act, 1870 (Dominion)* R. 231.
3. *The Dominion Lands Act (Dominion)* R. 232.
4. *The Manitoba Natural Resources Act (Dominion)* R. 232.
5. *The Indian Act (Dominion)* R. 233.
6. *The Public Lands Act (Ontario)* R. 233.

The construction of a storage reservoir would have required the consent of all five of these governments, of which three were in Canada. Easements in the lands which are the subject of this appeal were, at all times, useless for reservoir purposes unless they could be combined with rights in all other riparian lands in the hands of a person who had not only those rights, but also the authority and consent of the five interested governments. *The possibility of obtaining the consent of the interested governments is a contingency too remote to be an element in compensation.* The allowance of this appeal could only be based upon the theory of evaluating the remote possibility of the petitioner, or some other interested person, being able to obtain the consent of all five of these governments.

D.

By reason of the withdrawal of Canadian lands from acquisition by private interests, it was legally impossible for any private person to use the Lake of the Woods as a storage reservoir.

At the time of the taking of these flowage easements, and for some years preceding, it was legally impossible for the petitioner, for the Winnipeg power interests, or for any other person, to acquire the right to flow Dominion or Provincial foreshore lands on the Lake of the Woods. Without such right, the use of the lake as a storage reservoir was legally impossible, and, consequently, could not be regarded as an element in assessing compensation.

The only authorities that could lawfully establish a storage reservoir were the two Governments, acting conjointly and, pursuant to the Boundary Waters Treaty, 1909, and the recommendations of the International Joint Commission, proceeding by treaty and with the

aid of statutory powers, i.e., under the procedure actually followed, which has resulted in this Appeal. The special use was one available only to the United States, the expropriating authority. A use available only to the expropriating authority can not affect market values and can never be an element in the assessment of compensation.

By reason of the fact that the Dominion and Ontario Governments—realizing the complexity of the problem of securing a regulation of the Lake of the Woods which would be satisfactory to all interests affected (including navigation, fishing, lumbering, power, domestic, sanitary and general foreshore rights), and appreciating the fact that, because of the importance and conflict of these interests, it was contrary to public policy to permit private enterprise to acquire the foreshore lands—withdrew all the ungranted foreshore lands from disposition inconsistent with the recommendations of the International Joint Commission for regulation of Lake of the Woods, *it was legally impossible for any power interests to secure flowage easements on these lands for the purpose of regulating the lake for the benefit of power.*

The record of these withdrawals follows:—

The Dominion Lands Act under which the Crown Lands in the Province of Manitoba were administered from 1872 to July 15, 1930, provides under Section 78 that "the Minister may set aside and reserve from entry for homestead or from sale as agricultural lands, any lands which he considers . . . to be required . . . for the protection of ponds, lakes or other water supplies, or for the purposes of a water power, harbour, landing, or townsite . . ."

(A certified copy of the Dominion Lands Act forms part of the record as Exhibit No. 66. R. 248.).

Under the authority of the above Act, Mr. J. B. Challies, Superintendent of the Water Power Branch of the Canadian Department of the Interior, on September 1, 1915, recommended to the Deputy Minister that the Department "reserve the area" along the margin of Lake of the Woods in Manitoba "from homestead entry or other disposition for a year or until the Lake of the Woods Reference before the International Joint Commission has been disposed of."

This recommendation was approved by the Deputy Minister and appropriate action taken, and on September 21, 1915, Mr. Challies was advised, by letter from the Agent of Dominion Lands at Winnipeg, that the Agent had made a check of the records, and had reserved all the lands which were available.

On February 24, 1916, Mr. Challies by a formal memorandum to Mr. N. O. Coté, Controller of Land Patents of the Department of the Interior, called attention to certain lands reported as being vacant in order to be sure that the reservation was correctly noted. In a communication from Mr. F. S. Checkley, Controller of School Lands of the Department of the Interior, to Mr. Challies, dated April 7, 1916, Mr. Checkley reported that a temporary reservation had been made of the school lands mentioned in Mr. Challies' letter of the 24th of February.

(Certified copies of the above correspondence form part of the record as Exhibit No. 66. R. 249-250.)

The foregoing establishes that as early as September, 1915, there was put into effect a blanket reservation of the vacant Crown Lands in Manitoba bordering on the Lake of the Woods.

By Dominion Order in Council dated March 27, 1922, the above blanket reservation was replaced by a specific reservation. The Order in Council provided that:

"Whereas in the report dated 12th June, 1917, of the International Joint Commission with respect to the levels of Lake of the Woods it is recommended among other things that flowage rights should be secured up to contour 1064 sea level datum on all lands bordering on Lake of the Woods; and that Canada should acquire and hold in perpetuity for this purpose the necessary lands on the Canadian side of the boundary;

"And whereas His Excellency the Governor in Council did by Order in Council of the 17th July, 1919, accept and approve of the recommendations of the International Joint Commission in the above matters, copy of which Order in Council was transmitted to the Government of the United States under cover of a dispatch dated the 21st July, 1919;

"And whereas certain of the necessary lands on the Canadian side of the boundary are Dominion Lands or School Lands which it is, therefore, desirable to place under definite reservation;

"Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of the Interior, is pleased to order and it is hereby ordered as follows:—

"(1) All the lands affected as set out in Schedule 'A' hereto which are Dominion Lands are hereby reserved and any other lands in the said Schedule 'A' which may later come under the control of the Crown in the right of the Dominion of Canada shall thereupon be reserved from any disposition inconsistent with the requirements in connection with the regulation of the Lake of the Woods as set forth in the above mentioned Order in Council.

"(2) All the School Lands affected as set forth in Schedule 'B' hereto, shall be similarly reserved as soon as other available Dominion Lands have been selected in lieu thereof as provided in Section 39 subsection 2 of the Dominion Lands Act."

(A certified copy of Order in Council of March 27, 1922, forms part of the record as Exhibit No. 66. R. 250.)

Coming to the action taken in the Province of Ontario, the Ontario Public Lands Act under Section 60 provides that: "In all sales . . . and other dispositions of public lands . . . the Minister may reserve from sale, any water power or privilege, and such area of land in connection therewith as he may deem necessary . . . "

(A certified copy of the Ontario Public Lands Act forms part of the record as Exhibit No. 66. R. 251.)

At a meeting of the Lake of the Woods Control Board on 4th November, 1920, it was decided that the Board should formally request the Ontario Government to reserve a flowage easement around the Lake of the Woods.

Accordingly on November 24, 1920, Mr. J. B. Challies, Member and Secretary of the Board, addressed a letter to the Honourable Beniah Bowman, Minister of Lands and Forests of the Ontario Government, calling attention to Page 35 of the International Joint Commission's final report wherein it is recommended—"It further believes that, as far as possible the two Governments, respectively, should reserve a flowage easement over all public riparian lands around the larger lakes on the watersheds in both countries to an elevation of at least 5 feet above extreme natural high water mark or to such other elevation as after investigation they may agree upon." He advised Mr. Bowman that it was "the opinion of the Lake of the Woods Control Board that action should be taken by the Province to reserve the necessary flowage rights."

On November 30, 1920, Mr. Bowman replied to Mr. Challies as follows: "I am giving instructions that in the disposal of all Crown Lands adjoining the above mentioned lakes (this included the Lake of the Woods), a reservation of flooding rights should be made as suggested."

In response to an inquiry on the part of Mr. J. T. Johnston, Director of Water Power and Reclamation, Mr. L. V. Rorke, Deputy Minister of Surveys of the Ontario Government, on November 27, 1929, advised Mr. Johnston as follows: "Referring to our conversation yesterday in reference to the action which has been taken in this Department regarding a reservation of flooding rights over Crown Land along the shores of Lake of the Woods, Rainy Lake and Namakan Lake, referred to in the letter of the Honourable, the Minister of Lands and Forests, dated November 30, 1920, I have to say that the instructions to make such reservation have been carried out in the disposal of Crown Lands along the shores of these lakes since that date."

(Certified copies of the above correspondence form part of the record as Exhibit No. 66. R. 252, 253.)

It is established therefore that the Province of Ontario as early as 1920 placed a reservation for flowage purposes on all Crown Lands bordering Lake of the Woods.

Summarizing the foregoing, it has been established:—

1. That the Crown Lands in Manitoba bordering on the lake were withdrawn from private entry as early as 1915.
2. That the Crown Lands in Ontario bordering on the lake were withdrawn from private entry as early as 1920.
3. That the purpose of the withdrawal was to prevent any private interests from obtaining flowage rights, and to conform with the recommendations of the International Joint Commission.

It is therefore submitted that it was legally impossible for any power undertakings to have acquired flowage ease-

ment privileges around the lake in Manitoba and in Ontario for the purpose of regulating the lake for the benefit of power—and in fact the established policy of the two said governments was effectually designed for the express purpose of preventing any such monopoly.

E.

The legal obstacles to exercise of flowage rights on Indian Lands by private parties made it impossible to acquire such rights, save by eminent domain.

In view of the large number of Indian Reserves bordering on the Lake of the Woods in Canada, subject to the administrative control of the Dominion Government in the interests of the Indians, *it would have been impossible for private power interests in Manitoba to have secured the right to flood any portion of these lands without the consent both of the Indians and of the Canadian Government acting on behalf of the Indians.*

The number of Indian Reserves in question and the governmental control exercised over the same, are set forth in the following:

There are some 40 Indian Reserves in Canada bordering on Lake of the Woods with a total foreshore length of some 250 miles in connection with all of which negotions would be required with the Government of Canada and with the Indian occupants, before foreshore flooding would be permitted.

(A certified copy of a map showing the number and location of these Indian Reserves forms part of the record as Exhibit No. 69, R. 263.)

With regard to the disposition of Indian Lands, Section 50 of the Indian Act provides that, "Except as in this Part otherwise provided, no reserve or portion of a reserve, shall be sold, alienated or leased until it has been

surrendered to the Crown for the purposes of this Part, but the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled, without such land being released or surrendered . . . "

Section 51 of the Act provides that, "Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of 21 years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council by the Governor in Council or by the Superintendent General."

Section 54 of the Act provides that, "All Indian Lands which are reserves or portions of reserves surrendered, or to be surrendered, to His Majesty, shall be deemed to be held for the same purpose as heretofore; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Part."

(A certified copy of the Indian Act forms part of the record as Exhibit No. 62, R. 233.)

Summarizing the foregoing it has been established:

(1) that some 40 Indian Reserves border on Lake of the Woods with a total shore line of some 250 miles.

(2) that no portion of a Reserve shall be sold, alienated or leased except with the consent of the Canadian Government through the Superintendent General of Indian Affairs.

(3) that no release or surrender of a Reserve or portion of a Reserve shall be valid unless assented to by a majority of the male members of the band inhabiting the Reserve.

(4) that all surrendered portions of Indian Reserves shall be deemed to be held for the same purpose as before surrendered, that is for the benefit of the Indians.

It is submitted therefore, that because of the severe restrictions which are incorporated in and which must be adhered to, under the Indian Act it would have been practically impossible for private interests on the Winnipeg River or elsewhere to have acquired the right to flood the foreshore of the 40 Indian Reserves in question.

F.

The Lake of the Woods is a navigable water and hence subject to Dominion control.

It is submitted that because of the fact that the Lake of the Woods is a navigable water and hence is subject to Dominion control, it would have been impracticable for private power interests to have secured the right to regulate the lake in the interests of power alone; and that in view of the impossibility of securing this right these power interests would not have been warranted in making expenditures for the securing of flowage rights along the foreshore, even assuming the latter had been a practical proposition from other angles.

By the British North America Act, 1867, which forms the constitution of the Dominion of Canada, section 91 declares that the exclusive legislative authority of the Parliament of Canada was extended to "navigation and shipping."

(A copy of the British North America Act forms part of the record as Exhibit No. 62, R. 230.)

Under the Navigable Waters Protection Act, R.S.C., 1927, c. 140 (first passed in 1882), the Dominion Parliament legislated for the protection of its interests in navigable waters. Section 2 (*b*) of the Act provided that "'work' includes any . . . dam . . . or other structure . . . . and the approaches or other works necessary or appurtenant thereto, or any work, structure or device, whether similar in character to the foregoing or not, which may interfere with navigation." Section 4 provides that, "no work shall be built or placed in, upon, over, under, through or across any navigable water unless the site thereof has been approved by the Governor in Council, nor unless such work is built, placed and maintained in accordance with plans and regulations approved or made by the Governor in Council."

From this Act it will be apparent that the approval of the Dominion Government is essential to any structure interfering with navigation on the Lake of the Woods—a navigable water.

(A certified copy of the Navigable Waters Protection Act forms part of the record as Exhibit No. 63, R. 234.)

To summarize the foregoing, it has been established that the Lake of the Woods—a navigable water—is, so far as Canada is concerned, and in so far as the protection of navigation is concerned, under the administrative control of the Dominion Government.

It is therefore submitted that because of the Dominion control over navigation it would have been impracticable for private power interests to have secured the right to regulate the Lake of the Woods as a power storage reservoir without making full provision for the protection of navigation. The insistence of both the Dominion and the Province of Ontario upon the protec-

tion of navigation is more fully developed in Section G immediately following, which reviews the manner in which the outlets of Lake of the Woods have been controlled by the Dominion and Ontario Governments from 1898 to date.

Furthermore, the restriction upon the regulation of the lake levels resulting from this Dominion control over navigation was further intensified by the provisions and requirements of the Boundary Waters Treaty, 1909, whereby International restrictions were superimposed upon the use of the waters of the lake as a "boundary water." (Ar., pp. 65 et seq.)

G.

The Lake of the Woods outlets have been continuously controlled by the Governments of Ontario and of the Dominion, from 1898 to date.

Private interests could not have secured the lake as a storage reservoir for power purposes because of the fact that the regulation of the lake has been under Governmental control since 1898, and in consequence, private power interests not being able to acquire control over the outlets or the outflow through the same, would not have been warranted in attempting to secure flowage rights along the foreshore, even assuming that the latter had been a practicable proposition.

The record of Governmental control over the outlets follows:—

By an agreement in respect to the Norman Dam, dated June 22, 1898, between the Keewatin Power Company and Her Majesty, represented therein by the Commissioner of Public Works of the Province of Ontario, it was provided that "*whereas for the purpose of improving the navigation of the said lake it is expedient*

that the said dam should be improved by the addition of stop-logs and otherwise," the Company covenanted and agreed *"that the Commissioner shall have the right to regulate the height of the water and to control the dam as may be necessary."* (Italics supplied.)

It will be noted that the purpose of the regulation was the protection of navigation.

(A certified copy of this agreement forms part of the record as Exhibit No. 64, R. 237.)

As the development of the Winnipeg River Watershed proceeded, the Dominion and Ontario Governments, recognizing the complexity of the interests involved and the joint responsibilities of the two Governments towards the protection of these interests, agreed to place the regulation of the lake under a Joint Board. Accordingly, there was constituted the Lake of the Woods Control Board, consisting of four qualified civil engineers, two to represent the Dominion of Canada and two to represent the Province of Ontario.

(A certified copy of the Dominion Order in Council of January 21, 1919, forms part of the record as Exhibit No. 64. R. 237.)

(A certified copy of the Ontario Order in Council of February 13, 1919, forms part of the record as Exhibit No. 64. R. 238.)

It will be noted that the Control Board was required to regulate the lake and to maintain the level as nearly as may be, between elevations 1056 and 1061, i.e., regulate the lake in accordance with the recommendations of the International Joint Commission, in its Final Report, dated June 12, 1917; also that the Board was required to regulate in the interests of navigation (mentioned first), power and other interests both on the lake and on the river below.

The Lake of the Woods Control Board, as above constituted, satisfactorily served, for the time being, the purposes for which it was established. However, both the Dominion and the Ontario Governments recognized the desirability of giving the Board more definite administrative authority by means of Parliamentary enactments.

Accordingly, identical "concurrent" legislation was prepared and passed, the Dominion enactment being entitled "The Lake of the Woods Control Board Act, 1921" and the Ontario enactment being entitled "The Lake of the Woods Control Board Act, 1922." These two acts conveyed to the Board the combined authority of the Dominion and Province.

Owing to legislative difficulties developing at the time, the above legislation (which has been generally referred to as the "concurrent" legislation) was held in abeyance for the time being and the Dominion Lake of the Woods Regulation Act, 1921, was passed by the Dominion Parliament. Section 2 declared that "all dams, structures and other works of whatsoever description which have heretofore been or may hereafter be constructed in, upon, over, about or across any outlet of the Lake of the Woods. . . . which do or may or can in any wise control, regulate or affect the outflow of water from the said lake . . . are and each of them is declared to be for the general advantage of Canada."

Note.—The significance of this declaration is found in Section 92 (10) of the British North America Act, 1867, which provides that works declared by the Dominion Parliament to be for the "General Advantage of Canada," are subject to the exclusive legislative authority of the Parliament of Canada.

Section 3 provided for the regulation "and control of the outflow of the waters of the Lake of the Woods so as

to maintain the level of the said lake between the elevations recommended by the report of the International Joint Commission of June 12, 1917, or between such elevations as may be agreed upon by the United States and Canada, and so that the obligations, relating to the level of the Lake of the Woods, of Canada, or of any of the Provinces of Canada, as part of the British Dominions beyond the seas, towards the United States, arising out of treaty made or to be made between His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas, Emperor of India, and the United States, may be duly performed."

(A certified copy of the Lake of the Woods Regulation Act, 1921 (Dominion) forms part of the record as Exhibit No. 64. R. 240.)

Under the authority of the Lake of the Woods Regulation Act, 1921 (Dominion), the Dominion Order in Council, dated September 21, 1921, provided that "the four members of the original Board be reappointed in their present capacities" and reiterated the requirement that the Board should regulate the lake in the interests of navigation, power and other interests, and charged the Board with the responsibility of "the administration and enforcing of the provisions of the Lake of the Woods Regulation Act."

(A certified copy of the Dominion Order in Council dated September 21, 1921, forms part of the record as Exhibit No. 64. R. 242.)

The Lake of the Woods Control Board, as reappointed under this Order in Council, continued to exercise complete control over the levels of and the outflow from the lake under the above enactment until 1928.

In the year 1928, the Dominion and the Province of Ontario with the concurrence of the Province of Manitoba entered into an agreement for the creation of storage in Lac Seul, for the simultaneous repeal of the Lake of the Woods Regulation Act, 1921 (Dominion) and the bringing into force in the place thereof of the Lake of the Woods Control Board Act, 1921 (Dominion) and the Lake of the Woods Control Board Act, 1922 (Ontario), i.e., the " concurrent " legislation referred to in the foregoing.

The Lac Seul Conservation Act, 1928, was accordingly passed by the Dominion Government, Section 3 of which provided that " the Lake of the Woods Regulation Act, 1921, Chapter 28 of the Statutes of 1921 is repealed."

(A certified copy of the Lac Seul Conservation Act forms part of the record as Exhibit No. 64. R. 243.)

(A certified copy of the Proclamation of the Governor in Council, dated June 20, 1928, bringing into effect on the 30th of June, 1928, the Lake of the Woods Control Board Act, 1921, forms part of the record as Exhibit No. 64. R. 243.)

(Certified copies of the Dominion and Ontario Lake of the Woods Control Board Acts of 1921 and 1922 form part of the record as Exhibit No. 64. R. 238-240.)

Under the " concurrent " legislation, it became necessary to reappoint the Lake of the Woods Control Board under the new enactments.

Accordingly, by Orders in Council the members of the Board were reappointed.

(A certified copy of Dominion Order in Council dated June 20, 1928, forms part of the record as Exhibit No. 64. R. 243.)

(A certified copy of Ontario Order in Council, dated June 27, 1928, reappointing the two Ontario members of the Lake of the Woods Control Board, forms part of the record as Exhibit No. 64. R. 244.)

The foregoing series of Dominion and Provincial enactments establishes the fact that the structures controlling the lake outlets, together with the regulation of the lake levels and the outflow from the lake, have been under the direct control of the two Governments since 1919.

Supplementing the above enactments providing for Governmental control of the lake was the Lake of the Woods Convention of the 24th February, 1925, wherein it was provided that "The Government of Canada shall establish and maintain a Canadian Lake of the Woods Control Board . . . which shall regulate and control the outflow of the waters of the Lake of the Woods," and also that "There shall be established and maintained an International Lake of the Woods Control Board composed of two engineers, one appointed by the Government of Canada anad one by the Government of the United States . . . and whenever the level of the lake rises above elevation 1061, sea-level datum, or falls below elevation 1056, sea-level datum, the rate of total discharge of water from the lake shall be subject to the approval of this Board."

On February 24, 1925, therefore, the strictly Canadian Governmental regulation and control of the lake by the Lake of the Woods Control Board as at that time established, was supplemented by a Treaty which confirmed the control by the Canadian Lake of the Woods Control Board and superimposed an International Board responsible for the approval of the rate of total discharge of water from the lake when the lake rises above elevation 1061 or falls below elevation 1056. (Lake of Woods

Convention, United States Statutes at Large, 69th Congress, 1925-1927, Vol. 44, Pt. 3, Page 2108 et seq.; R. 244.).

Summarizing the foregoing, it is established:

1. That the regulation of the lake was undertaken by the Government of Ontario in June, 1898, and this control was exercised for the purpose of improving navigation on the said lake.
2. That by agreement between the Dominion and the Province of Ontario, expressed by Orders in Council issued by both Governments, the regulation of the lake was in 1919 placed under the Lake of the Woods Control Board, with instructions to regulate the lake in the interests of navigation, water-power and other interests, both on the lake and in the Winnipeg River.
3. That the jurisdiction of the Lake of the Woods Control Board was further established by legislation on the part of the Dominion Government entitled "the Lake of the Woods Regulation Act, 1921" and by "concurrent" legislation named the Lake of the Woods Control Board Act, 1921 (Dominion) and the Lake of the Woods Control Board Act, 1922 (Ontario),—these enactments being brought into effect in 1928 upon the repeal of the Dominion Lake of the Woods Regulation Act, 1921.
4. That the above legislation provided for the regulation of the lake in accordance with the recommendations of the International Joint Commission in its Final Report and in accordance with such elevations as might be agreed upon by treaty with the United States.
5. That this regulation also provided for the protection of domestic and sanitary interests, naviga-

tion and transportation interests, fishing interests, and power and irrigation interests.

6. That the above enactments provided ample powers to ensure the enforcement of the regulation by the Board.
7. That the Lake of the Woods Convention superimposed upon the above Canadian Governmental control, a Treaty commitment defining the jurisdiction of the Canadian Board and of a new International Board, and prescribing a regulation to be exercised to secure the most advantageous use of the waters in accord with the recommendations of the International Joint Commission.

In view of the foregoing considerations, it is submitted,—

That it would have been wholly impracticable for private power interests at any time since 1898 (some 8 years before the first power plant came into operation on the Winnipeg River) to have secured control over the outlets from the lake for the purpose of using the lake as a power storage reservoir, and

That, without securing such control it would have been completely out of the question for these power interests to have attempted to secure flowage easements along the shore of the lake, even assuming that such an arrangement would have been practicable from other angles.

It follows that the U.S. District Court was right in holding that the possibility of using the Lake of the Woods as a storage reservoir could not as a matter of law enhance the value of shore lands; for, manifestly, such storage possibilities would not, in the face of government control of the outlets, have brought any bidder into the market.

As a supplement to the contentions made in the argument presented under this heading and as indicating further how drastically the Dominion Government insisted upon retaining control over the lake outlets, reference might be made to the agreement entered into between His Majesty the King represented by the Minister of the Interior of the Dominion Government, and the Keewatin Power Company, dated December 11, 1924, covering the reconstruction of the Norman Dam, the construction of the power station located in and forming part of the dam, and the enlargement of the Western Outlet, all by the Keewatin Power Company in accordance with plans approved by the Dominion Government and with the Dominion Government contributing towards the cost of the outlets enlargement and of the reconstruction of the control dam.

The Government insisted upon control of the works either by the Control Board or by an officer of the Department and incorporated ample provisions for enforcing such control.

It will be noted that the Dominion Government—not content with the sanctions embodied in the Lake of the Woods Control Board Acts, 1921 and 1922 ("concurrent" legislation)—further embodied in the agreement entered into with the Keewatin Power Company for the actual enlargement of the Western Outlet and for the reconstruction of the Norman Control Dam, the following express conditions:—

1. That the Minister shall by means of the Lake of the Woods Control Board or by any officer of the Department of the Interior, at all times in the future control and operate the works as defined (i.e., both the control dam and the power house) for the purpose of securing to the public the most dependable flow and the most advantageous use

of the waters of the Winnipeg River, and of the Lake of the Woods.

2. That the control by the Minister shall be exclusive and that the company's rights to use water for the development of power and to use the works and the power house shall be subject to the right of the Minister to control the flow for the purposes aforesaid.
3. That the Minister is granted, for the purposes of control, a licence and easement for access to the lands and premises upon which the works are located.

It might be added that by a supplementary agreement between His Majesty and the Keewatin Power Company, also dated December 11, 1924, exactly similar provisions were agreed upon governing the control of the company's power plant in the Eastern Outlet and of the flow of the water through the same.

It is apparent therefore that in these agreements relating to the two structures controlling the outflow through the Western and Eastern Outlets of the lake respectively the use of water for power purposes was completely subordinated to the maintenance of a regulated flow " designed for securing to the public the most dependable flow and most advantageous use of the waters of the Winnipeg River."

(A certified copy of the Agreement between His Majesty and the Keewatin Power Company dated 11th December, 1924, covering the Western Outlet forms part of the record as Exhibit No. 65.

A certified copy of the Agreement between His Majesty and the Keewatin Power Company, dated 11th December, 1924, covering the Eastern Outlet forms part of the record as Exhibit No. 65. Pertinent Extracts are to be found in the Record, R. 245-248.)

H.

International commitments made independent action by private interests impossible.

Private interests could not, from the date of the execution of the Boundary Waters Treaty in 1909, have secured control of the regulation of the lake for any private interest whatsoever, whether for power, fishing, lumbering, irrigation, drainage, water supply or sanitary purposes, or even for the protection of foreshore properties, because of international commitments between the two countries.

The record of international restriction on the Lake of the Woods follows:—

The Boundary Waters Treaty, 1909, between the United States of America and His Majesty, provided in the preliminary article that, "boundary waters are defined as the waters from main shore to main shore of the lakes . . along which the International Boundary between the United States and the Dominion of Canada passes . . ." The waters of the Lake of the Woods are, therefore, "boundary waters," within this definition of the Treaty.

Article III of the Treaty provides that no further or other uses or obstructions . . of boundary waters on either side of the line affecting the natural level or flow of boundary waters on the other side of the line shall be made except:—

(1) By Special Agreement between the High Contracting Parties, or

(2) By authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval of the International Joint Commission established by the Treaty.

It is apparent from this article that no private interests could, after 1909, interfere with the levels of the Lake of the Woods.

Furthermore, Article VIII provides that,—"The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:

(1) Uses for domestic and sanitary purposes;

(2) Uses for navigation, including the service of canals for the purposes of navigation;

(3) Uses for power and for irrigation purposes."

It will be noted from the foregoing provision that the uses of water for domestic and sanitary purposes and for navigation purposes are given precedence over the use of water for power purposes. *This provision emphasizes the impossibility of the power interests alone securing control over the regulation of the lake for power purposes. Even the Governments in undertaking the regulation of the lake are compelled, by their mutual commitments, to place power interests fourth in order of precedence.*

Article IX of the Treaty provides that "The High Contracting Parties further agree that any other questions or matters of difference arising between them ... along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time, to the International Joint Commission for examination and report whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred." (The Boundary Waters Treaty—United States Statutes at Large, 61st Congress, 1909-1911, Vol. 36, Pt. 2, Page 2448; R. 256-257; Appendix A, infra p. 103).

Furthermore, supplementing the Treaty, the Parliament of Canada enacted that "The laws of Canada and of the several Provinces thereof are hereby amended and altered so as to permit, authorize, and sanction the performance of the obligations undertaken by His Majesty in and under the said treaty; and so as to sanction, confer and impose the various rights, duties and disabilities intended by the said treaty to be conferred or imposed or to exist within Canada."

It is therefore, apparent that Canada was explicitly bound by the restrictions imposed upon the Lake of the Woods as a "boundary water" by the Boundary Waters Treaty.

(A certified copy of the Act above referred to, relating to the establishment of the International Joint Commission forms part of the record as Exhibit No. 68. R. 258.)

Following the ratification of the Boundary Waters Treaty and in conformity with the provisions of Article IX thereof, the Governments of the United States and of the Dominion of Canada, by identical letters of reference, referred to the International Joint Commission for examination and report, the question of securing "the most advantageous use of the waters of the Lake of the Woods and of the waters flowing into and from the lake on each side of the boundary for domestic and sanitary purposes, for navigation and transportation purposes, for fishing purposes, and for power and irrigation purposes, and also in order to secure the most advantageous use of the shores and harbours of the lake and of the waters flowing into and from the lake. . ." R. 258, 259.)

It will be noted that the two Governments requested a report upon the most advantageous use of the waters of the lake for all purposes—not for power purposes alone.

The Commission in the course of its examination into the problem held Public Hearings as follows:—

At International Falls, Minnesota, on September 17, 1912.

At Warroad, Minnesota, on September 18, 1912.

At Kenora, Ontario, on September 20, 1912.

At Warroad, Minnesota, on September 7, 8, 9, 1915.

At International Falls, Minnesota, on September 10, 1915.

At Kenora, Ontario, on September 13, 14, 1915.

At International Falls, Minnesota, on January 28, 29, 1916.

At Winnipeg, Manitoba, on February 1, 2, 3, 4, 1916, and

At Washington, D.C. (Final Argument) on April 4, 5, 6, 8, 1916.

It will be noted that eight public hearings were held during a period extending from September, 1912, to February, 1916, plus a hearing at which final argument was presented in Washington in April, 1916. The eight public hearings were held in the district affected—three at International Falls, Minnesota, two at Warroad, Minnesota, two at Kenora, Ontario, and one at Winnipeg, Manitoba. These were advertised in advance and the various interests affected were directly notified and every opportunity given for the appearance before the Commission of all who had an interest in the lake levels.

A review of the Commission's hearings will indicate that full advantage was taken of these hearings by all parties concerned, including those interested in the foreshore properties which are now before this Court for condemnation.

It is also brought to the attention of the Court that the number of hearings and the extent and character and conflict of the representations made to the Com-

mission at these hearings by the various navigation, power, fishing, lumbering, foreshore and other interests concerned, is striking evidence of the complexity of the problem and the impracticability of private power interests attempting to secure on their own initiative a right to store water in the lake and to regulate the same for power purposes.

(A copy of the Final Report of the International Joint Commission forms part of the Record as Exhibit No. 71, page 13, v. R. 278.)

Following the hearings and final argument, the International Joint Commission issued a Final Report, dated May 18, 1917, and submitted to the two Governments on June 12, 1917, setting forth definite recommendations as to the regulation of the lake level and as to the outflow from the lake.

Following the receipt and consideration of the Final Report of the International Joint Commission, the principles embodied in the recommendations of the Commission were accepted by the two Governments, by an exchange of notes, early in 1919.

(Certified copies of the above exchanges between the two Governments form part of the record as Exhibit No. 68, v. R. 258.)

By the Lake of the Woods Convention signed on February 24, 1925, between His Majesty on behalf of Canada, and the United States, the two Governments accepted " as a basis of agreement the recommendations made by the International Joint Commission in its Final Report dated May 18, 1917, on the Reference concerning the Lake of the Woods," and agreed to the regulation of the lake within the limits set forth therein. (Lake of the Woods Convention, United States Statutes at Large, 69th Congress, 1925-1927, Vol. 44, Pt. 3, Page 2108 et seq.)

From the foregoing it is established:

1. That no interference with the levels of the Lake of the Woods has been possible since the ratification of the Boundary Waters Treaty in 1909, except by a Special Agreement on the part of the Governments of Canada and the United States or with the approval of the International Joint Commission.
2. That the two Governments committed themselves in the Boundary Waters Treaty to an order of precedence which should be thereafter observed as amongst the various uses for which these waters might be applied and that this order of precedence placed domestic, sanitary and navigation uses ahead of uses for power purposes.
3. That the two Governments, realizing the complexity of the problem and of the interests at stake, took action under Article IX of the Treaty and referred the whole problem of securing the most advantageous use of the waters of the Lake of the Woods and of the waters flowing into and from the lake on each side of the boundary for domestic, sanitary, navigation, transportation, fishing, power and irrigation purposes, to the International Joint Commission for examination and report.
4. That following extensive public hearings at which all interests concerned in or affected by the lake levels, had the opportunity of being heard and at which all such interests were heard, the Commission agreed upon certain recommendations and included the same in a final report submitted to the two Governments.
5. That by an interchange of correspondence the two Governments, in April, 1919, agreed to the prin-

ciples of the recommendations contained in the Commission's Final Report.

6. That this agreement was finally embodied in the Lake of the Woods Convention signed on February 24, 1925, which accepted " as a basis of agreement the recommendations made by the International Joint Commission in its final report dated May 18, 1917, on the reference concerning the Lake of the Woods," and provided for the regulation of the lake within the limits set forth therein which govern these proceedings.

In view of the above mentioned International Commitments by the Governments concerned, it is submitted:

1. That it was impossible for any private interest independently to have secured control of the regulation of the lake for any purpose which would have interfered with the lake levels at any time subsequent to the Boundary Waters Treaty, 1909.
2. That it would have been impossible for private power interests on the Winnipeg River or elsewhere to have secured control of the regulation of the lake for power purposes in view of the navigation and other interests which were involved and which, under the order of precedence established by the Treaty, would necessarily require the consideration and protection of both governments.
3. That any Governmental action taken in conformity with the Boundary Waters Treaty was inevitably a slow and tedious process because of the complexity of the problem and the conflicting claims and requirements of the various interests affected by the lake level.

4. That the Governments concerned realized the impossibility of any single interest, such as navigation or power taking steps to secure a fixed level or storage range on the lake and took it upon themselves to settle the matter on behalf of all interests by a joint government reference, to the International Joint Commission, under Article IX of the Boundary Waters Treaty.

5. That the existence of the joint governmental reference in respect to the Lake of the Woods, made it obviously impracticable for any private enterprise to submit an application to the International Joint Commission, under Articles III, IV, and VIII of the Boundary Waters Treaty. (This point is of particular importance in considering the offers of proof Nos. 73 and 74, R. 78.)

6. That International Treaty commitments made it impossible for private interests to secure the right to regulate the lake as a storage reservoir in the interests of power.

I.

Impracticability of securing concurrence of all interested parties to level control by any other agency than the Governments pursuant to treaty.

The differing requirements of the various interests concerned in the lake levels, including those of navigation, fishing, lumbering, domestic water supply, power, and of foreshore property holders, made it impracticable for private power interests on the Winnipeg River in Manitoba to have arranged for a co-ordination of these diverse interests for the benefit of power alone on the Winnipeg River in Manitoba.

In the identical letters of reference on behalf of the Governments of the United States and of Canada, dated June 27, 1912, and addressed to the International Joint Commission, the Commission was requested to examine and report to the two Governments "upon the effects and circumstances of the practical questions and matters referred together with such conclusions and recommendations as may be appropriate." The first question so referred is quoted as follows:—

> "(1) In order to secure the most advantageous use of the waters of the Lake of the Woods and of the waters flowing into and from the lake on each side of the boundary for domestic and sanitary purposes, for navigation and transportation purposes, for fishing purposes, and for power and irrigation purposes, and also in order to secure the most advantageous use of the shores and harbours of the lake and of the waters flowing into and from the lake, is it practicable and desirable to maintain the surface of the lake during the different seasons of the year at a certain stated level, and if so at what level?

The importance of the various interests dependent upon the lake for domestic and sanitary purposes, for navigation and transportation purposes, for fishing purposes, and for power and irrigation purposes was thus definitely recognized by the two governments concerned as early as 1912, and to such an extent that they were specifically brought to the attention of the International Joint Commission in order that each might receive proper consideration in the determination of the most advantageous use of the waters of the lake and of the waters flowing into and from the lake on each side of the boundary.

Full opportunity was given to these diverse interests to appear before the Commission and present their respective views and requirements in the various hearings held by the Commission. (Supra, p. 68.)

It will be noted that the first question referred to the International Joint Commission as quoted above contemplates maintaining the surface of the lake at a fixed level. But the Commission in the course of its investigations found that this could not be done. In its Final Report, dated May 18, 1917, the reason is made clear:—

Page 26 of the Final Report states:—

"In view of the great variations in precipitation occurring from year to year, the maintenance of an absolutely uniform level of the Lake of the Woods, over long periods of time, is not practicable, nor is it desirable, because it would not admit of the most advantageous use of the waters flowing into and from that lake."

As a result of the physical conditions affecting lake levels and to secure the most advantageous use of the waters for all purposes, the Commission recommended a definite range of levels and not one fixed level.

The extreme conflict between what would best meet the requirements of the various interests concerned is exhaustively established in the Final Report of the Commission, and is shown by the following extracts:—

Riparian Lands.

Page 41 of the Final Report states: "The most desirable level for the agricultural interests around the Lake of the Woods is a low level."

Navigation.

Page 42 of the Final Report states:—"The effect of various levels on the navigation and summer-resort interests, in the vicinity of Kenora, is in a large measure determined by the depths in the various navigation channels and harbours of the lake, by the available depths of water leading to the boathouses, and by the elevation of the boathouse floors and the tops of docks . . . It appears from these curves that the tops of all docks in the vicinity of Kenora and Keewatin are at or above an elevation of 1,061 sea level datum, and that the boathouse floors are all above an elevation of 1,059·5,

over 90 per cent of them being above 1,061. Only about 50 per cent of both docks and boathouse floors, however, are above elevation 1,062."

Page 43 of the Final Report states:—"Low stages, that is, stages below about 1,058, will also require additional dredging in harbours and navigation channels in various portions of the lake."

Page 43 of the Final Report also states:—"At the public hearings, 1916, Mr. W. J. Stewart, Chief Hydrographer, speaking for the Dominion Government, stated that an occasional low level of 1,056 could be accepted and that an ordinary level of 1,060·5 would be desirable for the navigation interests, but that 1,061·0 was not objectionable, except in so far as it might make it difficult to prevent the lake from exceeding 1,062·5 in seasons of extreme flood."

Page 44 of the Final Report states:—"Major E. D. Peck, in charge of navigation improvements on the United States side of the lake, stated that a range of levels between 4 and 7 feet on the Warroad gauge, or 1,057·6 to 1,060·6 was satisfactory to his Government."

Navigation below Outlets.

Page 44 of the Final Report states:—"Navigation interests on the Winnipeg River between Kenora and Minaki are affected by fluctuations in the outflow from the lake. In view of the fact that at low water there is less fall and hence less current at The Dalles, than at high water, moderately low rates of outflow from the Lake of the Woods are more favourable for navigation on that portion of the Winnipeg River than high rates. Very low rates of discharge, however, are unfavourable to navigation of the river immediately below the outlets of the lake. It follows then that any regulation of levels and outflow which results in either very low or very high rates of outflow from the lake is detrimental to the navigation interests on the Winnipeg River below the outlets of the lake."

Lumbering Interests.

Page 43 of the Final Report states:—"The lumbering interests are affected by the levels of the Lake of the

Woods mainly in so far as the stage of the lake has a bearing on the facility with which logs can be taken out of the various bays and inlets, and then towed across the lake and hoisted into the mills by means of jack ladders. In low water the towing channels become narrower and more difficult of navigation with log booms, through the protrudence of reefs above the water surface. The cost of handling logs in the log ponds of the mills is also increased."

Summer Resort Interests.

Page 44 of the Final Report states:—"Mr. Thomas R. Deacon, speaking for the summer resort interests, stated that a range of levels between 1,061 and 1.058 would be satisfactory to these interests."

Fishing Interests.

Page 45 of the Final Report states:—"The most desirable level for the fishing interests is a fairly uniform level. The testimony of Mr. Paul Marschalk, representing the United States fishermen, Mr. Arthur Johnson, representing the Canadian fishermen, and Prof. Edward E. Prince, Dominion Commissioner of Fisheries, is in full accord in this respect. A large and rapid drop in stage in a single season is particularly undesirable. The proposed regulation successfully prevents this."

Domestic and Sanitary Interests.

Page 46 of the Final Report states in discussing the Winnipeg aqueduct:—"The interests of the City of Winnipeg would be served by a high level. Shoal Lake, however, may be maintained at any desirable level by the construction of a dam at the outlet of Ash Rapids, or water can be pumped into the aqueduct in case of low stages in the future."

Page 46 of the Final Report also states:—"The interests of the town of Warroad in the use of the waters of the Lake of the Woods for domestic and sanitary purposes would appear to be primarily the use of that body of water for the purposes of drainage and of sewage disposal. As the general elevation of the ground upon which the town of Warroad is built is only between 1,066 and 1,068, sea level datum, it is evident that the outlet of a gravity discharge

system of sewerage could not possibly be placed above even ordinary high water in a state of nature without raising the house connections of the sewers above the bottom of the cellars and above the frost line. Even under the natural regimen of lake levels, then, it would have been necessary for the town of Warroad to install some form of sewage lift for use during high water."

Water-power at Outlets of Lake.

Page 46 of the Final Report states:—"The fall at the outlet of the Lake of the Woods varies both with lake level and with outflow. An increase in lake stage produces a corresponding increase in fall. The available head, however, varies inversely as the outflow—that is, the greater the outflow the less the head, because of the rise in tail-water level, which accompanies increased outflow. The most desirable condition for the water-powers at the outlets of the lake would be to have both a high uniform level and a uniform outflow. It being impossible, as stated before, to obtain both of these results at the same time, the most advantageous conditions can only be determined by weighing the advantages and disadvantages resulting from different systems of regulation."

Navigation and Power Interests on Lower Rainy River.

Page 48 of the Final Report states:—"High levels on the Lake of the Woods and moderately high rates of discharge in Rainy River both tend to improve navigation through the Long Sault Rapids. Only the construction of a dam at the Long Sault, however, will improve navigation through the Manitou Rapids. The fall at the latter rapids increases with increasing stage, making them dangerous to navigation at high water."

Summarization of Effects of Levels on Various Interests.

On Page 49, the Final Report summarizes as follows:—

"In the preceding pages the kind of regulation favourable to the several interests using the waters of the Lake of the Woods and its shores and harbours has been briefly discussed. Evidently there is considerable conflict between the requirements

of these interests. On the one hand are the navigation, fishing, and summer resort interests, which desire regulation to secure a uniform level, and on the other are the water-power interests on the Winnipeg River, which desire regulation to secure uniform outflow, necessitating the largest practicable fluctuation in level. The riparian owners desire a low level and the water-powers at the outlets a high level. In endeavouring to reconcile these differences, so far as practicable, the commission has taken a position between these extremes and recommends a regulation which will subserve all interests reasonably well and which, so far as appears practicable, will admit of the most advantageous use of these waters."

Page 6 of the Final Report summarizes as follows:—

"The principal interests affected by increasing the ordinary maximum level are the riparian owners, including the town of Warroad, and the fishing interests in the United States portion of the lake and the summer resorts in the Canadian portion of the lake. The principal interests affected by reducing the minimum level are the water-power plants and lumbering interests at the outlets and the navigation interests in both countries. The interests most affected by a range in levels are the fishing interests. In endeavouring to arrive at the most desirable level for the Lake of the Woods, and the extent to which it is practicable and desirable to equalize the outflow by permitting a draft on stored water, the commission found it extremely difficult to evaluate the injurious effect of high levels on fishing in the Big Traverse, of low levels on the navigation interests, and of fluctuations in level on the fishing interests in both countries. The ordinary maximum level and the system of regulation here recommended, it is believed, come as near as is practicable to securing the most advantageous use of these waters by all interests concerned."

(A certified copy of the Final Report of the International Joint Commission, dated May 18, 1917, has already been submitted to the Court as Exhibit No. 71, R. 278.)

Water-power Interests on Winnipeg River.

A consideration of the Final Report, as a whole, without reference to any particular citation, establishes that the interests of water-power on the Winnipeg River are best served by securing a storage range upon the lake, within the limits of which water can be drawn upon, with a view to increasing the flow of the water in the river during periods of low run-off.

The Reference to the International Joint Commission culminated in the Convention and Protocol which were concluded on February 24, 1925, for regulating the level of the Lake of the Woods and the outflow therefrom. (United States Statutes at Large, 69th Congress, 1925-1927, Vol. 44, Pt. 3, Page 2108 et seq. R. 258.)

The preamble to the Convention states as follows:—

"Desiring to regulate the level of the Lake of the Woods in order to secure to the inhabitants of Canada and the United States the most advantageous use of the waters thereof and of the waters flowing into and from the lake on each side of the boundary between the two countries; and

"Accepting as a basis of agreement, the recommendations made by the International Joint Commission in its final report of May 18, 1917, on the Reference concerning Lake of the Woods submitted to it by the Governments of Canada and the United States of America."

Article 2 of the Convention provides as follows:—

"The level of Lake of the Woods shall be regulated to the extent and in the manner provided for in the present Convention, with the object of securing to the inhabitants of Canada and the United States the most advantageous use of the waters thereof and of the waters flowing into and from the lake on each side of the boundary between the two countries for domestic and sanitary purposes, for navigation purposes, for fishing purposes, and for power, irrigation and reclamation purposes."

Attention is drawn to the fact that Article 2 is the paramount or governing article of the Convention. Article 1 simply defines certain of the terms used in the

Convention. Article 2 sets forth the basic objective of the Convention and the basic agreement between the two governments. The remaining articles of the Convention, as well as the Protocol in its entirety, cover the provisions which are necessary to give effect to Article 2.

To summarize the foregoing, it has been established:—

1. That, as early as 1912, at the time the Lake of the Woods question was referred to the International Joint Commission by the two Governments for examination and report, the importance and variety of the different interests dependent upon the lake and the flow into and from the lake was clearly recognized and was brought particularly to the attention of the Commission in its consideration of the problem.
2. That there is a very great conflict between the various interests concerned in the lake levels as to what level or range of levels would best meet their different individual requirements.
3. That in the Lake of the Woods Convention signed on February 24, 1925—the culmination of the international consideration of this problem—the paramount or governing article specifically provides for a regulation of the lake so as to secure the most advantageous use of the waters of the lake, and of the waters flowing into and from the lake, for the various interests as a whole dependent upon the same.

The fact that there were these various interests established in the vicinity of, and dependent upon, the waters of the lake and upon waters flowing into and out of the lake, and that these interests were of such a varying character and differed so radically in respect to the levels

and outflow that would best meet their respective needs made it impossible for private power interests on the Winnipeg River in Manitoba to have successfully negotiated with, and arranged for the co-operation of, these diverse interests and for the acceptance by them of a range of levels which would meet the requirements of the power interests for the regulation of the lake for power purposes.

The only agency which could effectively co-ordinate the viewpoint of these conflicting interests was a governmental agency,—and in view of the lake being a boundary water within the definition of the Boundary Waters Treaty, 1909,—the only possible means of co-ordinating the interests on both sides of the line was by the two Governments acting in conformity with the provisions agreed upon in the said Boundary Waters Treaty, implemented by a further international Treaty or Convention such as that actually made in the Lake of the Woods Convention.

J.

Conclusions.

In view of the foregoing obstacles that must be surmounted by the petitioners, or by any private enterprise purchasing flowage easements from the petitioners, before a reservoir could be established, it is clear that the physical adaptability of the petitioners' lands for reservoir use could not possibly be an element of value for which they could be compensated. At the date of the condemnation, the possibility that a purchaser might be found, willing to pay for the interest taken on the basis of special adaptability to flowage for power purposes, was a possibility too remote to be an element in the determination of their then market value.

3. The fact of flowage prior to condemnation is irrelevant to a determination of the compensation to which the owners are entitled in this proceeding.

The preceding sections of the argument have proceeded from the theory that past flowage should be eliminated from consideration in assessing compensation upon the acquisition of the flowage easements in the present proceedings.

It has been contended throughout this case that the use which the property has served during the past thirty years, and was serving at the time of the condemnation, should be considered by the jury in determining just compensation. The use alleged is the use as part of a valuable storage reservoir used in the development of hydro-electric power and other purposes.

It has been pointed out that the regulation and control of the levels of the Lake of the Woods for the period of thirty years, had been a regulation in the interest of navigation, the benefits to power being merely incidental (supra pp. 7-9). This point is, however, not of primary importance, because, whether or not the past regulation was a regulation in the interest of power, it would not justify compensation to the petitioners, on the basis of special adaptability of their lands for reservoir purposes.

At first impression, it would seem to be fair that the petitioner should be compensated on the basis of the actual use to which his property had been put for the past thirty years. It is necessary, however, to examine the nature of this use and it will appear that it was not a use available to the petitioner, and it was not a use capable of affecting market values.

It is submitted that, under the law of eminent domain, the petitioner is only entitled to be compensated where

he has lost something of value to himself. The United States Government, in condemning the petitioners' flowage easements, has not deprived them of any element of value to the petitioners in so far as the alleged use is concerned. The artificial regulation of the lake during the thirty-year period preceding the condemnation, had not been, and could not be, of any value to the petitioners. They were not using the lands for reservoir purposes themselves and it is not claimed that the lands could have had any use value save in conjunction with all the other riparian lands. They could not sell their flowage rights to any private enterprise. The possible purchaser, at any time preceding the taking, would have faced the same series of obstacles that are enumerated in the nine headings under the preceding section of the argument. The possibility that a purchaser might be found, willing to pay for flowage rights over the petitioners' lands, on the basis of special adaptability to flowage or power purposes, was too remote to be an element in determining their market value prior to the date of the Lake of the Woods Convention, 1925.

The mere physical adaptability of petitioners' lands for reservoir purposes, or even the physical existence of an actual reservoir, could not be an element in value to the petitioners or to any possible purchasers. Assuming the existence of a reservoir, it could only be valuable to the power interests or to any other private enterprise if they could have the legal right to regulate the levels in the interests of power and the legal right to continued existence of the reservoir and continued privilege of regulation. No private interest would invest capital in the acquisition of flowage rights from the petitioners or any other landowners, unless there was some practicable way in which they could insure the continued existence of the reservoir and a permanent right to regulate and

control the levels in the interests of water-power development.

There could not be a purchaser for the petitioners' flowage rights, because it was impossible for any person or any private interest to acquire the legal right to maintain a storage reservoir on the Lake of the Woods. The offers of proof included proffered testimony by Mr. Meyer, with a view to establishing that there was conflict and competition between Ontario and Manitoba interests. It may be conceded that there was a conflict in interest between authorities and corporations in Ontario and in Manitoba in respect to the regulation and control of the Lake of the Woods. If it had been legally possible for either of these competing groups to acquire and establish a power reservoir on the Lake of the Woods, it might have been theoretically feasible for either group to acquire flowage easements on the United States foreshore, provided that a practicable scheme for uniting the almost innumerable land titles, and controlling the outlets, could have been devised. The obstacles to establishing such a reservoir have been set forth in the preceding section of the argument.

The only element of value to the petitioners, arising from the past user of their lands, is the possible existence of a right to redress against the Canadian agencies which had regulated the levels of the lake during the period under discussion. The question of whether such a right to redress existed will be considered in the following section of the argument. Even if such a right to redress existed, it could not be taken into account in evaluating compensation for the taking of the flowage easement. The petitioners are being paid for past damages in a separate proceeding. They will be compensated for all future damages to their lands upon payment of the amounts awarded by the verdicts of the jury and the

judgment of the District Court. To bring into account in the present proceedings the deprivation of a possible right to redress against the Canadian agencies in question, would be to cause the landowners to be paid twice for the same injury. This result, obviously, could not have been intended by the Lake of the Woods Convention and the enabling legislation.

Consequently, as the petitioners could not use their lands for reservoir purposes and could not receive any profit from the alleged use during the thirty-year period, and as there could not be any interests competing for the acquisition of flowage easements, and in view of the legal and practical impossibility of any person getting in the title and establishing a reservoir, it is submitted that the alleged use cannot be relied upon as a basis for compensation.

4. The landowners, prior to the Lake of the Woods Convention (1925) had no right to redress for flowage and the judgment appealed from, to the extent that it is based on this proposition, is not inconsistent either with that Convention or with the prior Boundary Waters Treaty of 1909.

It has been contended that by the Boundary Waters Treaty, 1909, or under the general law, the flooding of lands in Minnesota caused by interference with the outflow of the lake in Canada, gave to the owners of such lands rights and remedies for redress on account of such flooding (Petition and Brief in Certiorari, p. 2). The Circuit Court of Appeals in the majority opinion took the view that the owners did not have a right to compensation from the Canadian agencies which were responsible for the flooding. (R. 426-427). It has been contended that such a finding was a construction of the Boundary Waters Treaty, 1909, in a manner prejudicial to the rights of American property owners and contrary to the

terms of the Treaty and likely to cause international misunderstanding. (Petition and Brief in Certiorari, p. 9). It has also been contended that the decision was probably contrary to the spirit of the provisions of the Treaty of 1925 (the Lake of the Woods Convention, 1925) and the Acts of Congress giving effect thereto. (Ibid, p. 11-12)*

A.

Whether the landowners had a right to redress for past flooding.

The views of the petitioners in this matter are supported by the dissenting opinion of Booth, Circuit Judge, in which the following statement is made:—

> "(3) Nor was the situation of the landowner as to recovery of such flowage use value as damages from the trespassers one of mere hopeless speculation. Were this the case, it would be a reproach to both Governments concerned. On the contrary, it is, in my opinion, a reasonable and safe conclusion that once the facts were established, the landowner could get compensation in damages in the courts of Canada, if the trespass had been committed by private parties; and probably could obtain compensation by Petition of Right, if the flowage use had been taken by authority of the Canadian Government (See Halsbury's Laws of England, Vol. 1, p. 17, paragraphs 21, 22, 23 and 24; and Vol. 10, pp. 26-30; also Vol. 2 D.L.R. (1928), p. 625, annotation "Petition of Right" by Arthur S. Bourinot); and certainly he could obtain redress through diplomatic action between the two Governments.
>
> "Such, substantially, was the situation, in my judgment, when the present condemnation proceedings were brought." (R. 433.)

In approaching the question of the existence of a right to redress in the Canadian Courts, it may be observed that this is a question of foreign law and should have been raised and proved by competent evidence at

* These matters are also dealt with in the petitioners' brief in the present proceedings, pages 43-47, 117.

the trial. The petitioners seek to base their claims upon the past user of their lands. It is an integral part of the petitioners' case that this past user was an element of value to them for which they should be compensated, and they seek to establish that the user in question was valuable, rather than detrimental, by asserting that they had available to them rights of redress in the Canadian Courts against the agencies which had regulated the levels of the lake in the past. The existence of a right to redress is, therefore, an integral part of the petitioners' case, and the burden is upon the petitioners to establish that such a right existed.

It is submitted, with the utmost deference, that the existence of a right of action in the Canadian Courts, under the Canadian law, cannot properly be proved, either by its assertion or by the statement of the learned Circuit Judge in his dissenting opinion.

The learned judges who delivered the majority opinion were clearly right, in the absence of any competent evidence of the existence of a right to redress, in taking the view that the landowners had no hope of redress for the alleged trespass to their lands. Upon this view, the alleged trespassory use was a reducer of value, rather than an element of value to the owners. (R. 426-427). However, without prejudice to the position that has just been taken, and without conceding that the existence of a right to redress has been adequately proved so as to merit notice by the Court, it seems to be desirable to include an examination of the legal basis of the question in an Appendix (infra p. 126).

It will be clear as a result of such examination of the Canadian laws that the landowner in question could not present a tortious claim by Petition of Right; that he had no claim against the servants of the Crown who con-

ducted the physical regulation of the levels of the lake; that he could not present a claim upon the theory that an easement had been expropriated; and that if remedies had existed they would have been barred by the Statute of Limitations and by the acquisition by the Crown of a flowage easement by prescription long before the date of the Lake of the Woods Convention, 1925, and of the compulsory taking of the lands in question. Further, the landowner had no right of action against any private interests because the regulation of levels was conducted by the Crown; and the company, that built Norman Dam originally, was not legally responsible for its subsequent regulation by governmental agencies.

The learned Circuit Judge was of the opinion that it was certain that a remedy was open to the landowner, through the diplomatic channels. It is submitted, with the utmost deference, that the learned Circuit Judge must have been under a misapprehension as to the diplomatic position.

For the purpose of this argument, it may be conceded that, if Canadian agencies had carried out the regulation of lake levels at Norman Dam against the will of the United States, a valid international claim would exist, notwithstanding the barring of the landowner's claim, whether by the operation of the Statute of Limitations, the acquistion of an easement by prescription or any other special rules of law in force in Canada. Further, for the purpose of this argument, the possible effect of laches upon an international claim may be overlooked, and the principle that a claimant must first seek redress in the domestic tribunals, may be disregarded. It becomes unnecessary to raise these possible points, because

of the attendant circumstances, regarded from a diplomatic point of view. The object of the regulation as carried on during the thirty-year period, was the maintenance of summer levels in the interests of navigation, —a matter of great concern to the United States Government. Indeed, the United States Government urged the Canadian Government, in the interest of navigation, to maintain the levels at an even higher range than that which was being maintained by the then existing control (Final Report of the International Joint Commission, p. 18, Ex. 71, v. R. 278, Appendix F, infra p. 122). The United States Government did not make diplomatic representations protesting against the action of the Canadian governmental authorities in regulating levels in the interest of navigation. On the contrary, the United States Government urged the maintenance of even higher levels, and the whole action of the Canadian governmental authorities in maintaining the levels established by Norman Dam in the interest of navigation, can appropriately be regarded as action taken at the request of and with the full concurrence of the United States Government. The maxim that one cannot blow both hot and cold is applicable in diplomacy as well as in the field of municipal law. If the United States Government had protested against the injury to the landowner in question and urged consideration of his claim, the obvious and conclusive reply would have been that the injury was incidental to action taken with the full concurrence of the United States Government. If the matter had been referred to a Claims Commission, the tribunal would necessarily have ruled that the United States Government could not, in the circumstances, submit the claim. It could not be an international wrong to the United States to comply with the request of the State Department to the extent

that the allegedly delinquent government was capable of responding.

Accordingly, it is obvious that the landowner could not, at any time, have obtained redress through the diplomatic channels.

In any event, it is, in the present circumstances, idle to speculate with regard to diplomatic redress. It has already been pointed out (supra p. 11), that the Governments of the two countries referred the questions arising out of the regulation of the level of the Lake of the Woods, to the International Joint Commission. After extended hearings and a report by the Commission, the international questions were settled by the conclusion of the Lake of the Woods Convention, 1925. This Convention contained appropriate provisions to compensate the landowners for all past damages, and proceedings are available to all landowners to recover past damages under the enabling legislation.

While it has been established that the landowner was not in a position to recover damages for the injury done to his property, it is difficult to appreciate the significance of this point in relation to the question of special adaptability. Even if the landowner had available to him ample remedies whereby he could have recovered damages (which opportunity was terminated by the legalization of the regime of levels, upon the conclusion of the Lake of the Woods Convention), it does not follow that he would be entitled to recover either past damages or compensation for the taking of a flowage easement on the basis of special adaptability. The damages recoverable could not possibly have had any relation to special adaptability values. They would have been restricted to the injuries actually suffered by the landowner.

B.

Whether the ruling of the Circuit Court of Appeals in this matter is inconsistent with the Boundary Waters Treaty 1909.

The Circuit Court of Appeals, in the majority opinion, took the view that the owners would not have a right to compensation from the Canadian agencies which were responsible for the flooding (R. 426-7). It has been contended by the petitioner that this is a construction of the Treaty in a manner prejudicial to the rights of owners of riparian lands in the United States, and contrary to the terms of the Treaty and likely to cause international misunderstanding.

This view, and also the statements in the dissenting opinion (R. 432), are apparently based upon the theory that the cases were covered by the provisions of Article II of the Treaty. In the dissenting opinion, the second clause of the first paragraph of Article II is quoted, and the effect of the first part of the paragraph upon the interpretation of the second, seems to have been overlooked. The article as a whole should be examined:—

ARTICLE II

> Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of *all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters;* but it is agreed that any interference with or diversion from their natural channel of *such waters* on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the

country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto.

It is understood, however, that neither of the High Contracting Parties intends by the foregoing provision to surrender any right, which it may have, to object to any interference with or diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary. (Italics supplied.)

Reading the whole of the first paragraph, it is clear that the words "such waters" are necessarily restricted to the waters described in the preceding part of the sentence, namely "all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters." "Such waters," therefore, would be limited to waters that would in their natural channels flow across the boundary or into boundary waters. The words could not include the waters at the outlets of the Lake of the Woods. These waters would not, in their natural course, flow across the boundary and obviously, being boundary waters, they could not be regarded as waters flowing into boundary waters. The provisions of Article II cannot possibly have any relation to interferences with or diversions of boundary waters, or to interferences with or diversions in the lower reaches of waters flowing across the boundary. They are obviously intended to relate solely to interferences with or diversions in the upper waters of streams that flow across the boundary, or into boundary waters, when such action causes injury in the lower reaches of the stream on the other side of the boundary.

The position under the Treaty may be illustrated by taking the case of a well known river, such as the Red River of the North, which flows from the United States

into Canada. Under the terms of Article II, the United States has reserved exclusive jurisdiction and control over all action relating to the Red River, up to the place at which it crosses the international boundary line. That is to say, the use and development of the upper portion of the water is not, by the Treaty, placed under the control of the International Boundary Commission. On the other hand, recognizing that action in relation to the upper reaches of such a river might cause injury to riparian proprietors and others in Canada, such injured persons in Canada are given a right of action in the courts of the United States. On the other hand, the lower reaches of the Red River in Canada are placed under the supervision of the International Joint Commission. Dams or other obstructions that might retard levels on the United States side of the boundary line, are absolutely under the control of the International Joint Commission and are dealt with in certain of the other articles of the Treaty, particularly Articles IV and VIII. If injury results to interests in the United States, the injured parties would be provided for by the International Joint Commission, pursuant to the terms of Article VIII. In a river such as the Columbia, which flows from north to south, the position would be precisely reversed.

It is clear, therefore, that the landowners did not have any right to redress under the terms of Article II of the Treaty.

The general scheme of the Treaty is apparent upon analysis, particularly, analysis of the provisions relating to works in waters that affect conditions on the other side of the international boundary. Works in upper reaches of streams flowing across the boundary, or into boundary waters, come under the provisions of Article II. Works in waters flowing from boundary waters or

in waters at a lower level than the boundary in rivers flowing across the boundary, come under the provisions of Article IV. Works in boundary waters affecting the natural level or flow of boundary waters on the other side of the line, come under the provisions of Article III. It is clear that the Lake of the Woods comes within this category because it undoubtedly is a boundary water as interpreted in the preliminary article of the Boundary Waters Treaty. (Infra p. 103).

It is thus clear that the question of control and regulation of the Lake of the Woods would not come under the provisions of Articles II or IV, but would come under the provisions of Article III, unless excluded from Article III by the terms of that article. An examination of the terms of Article III (infra p. 105) indicates that the High Contracting Parties intended to save from the operation of the article " the uses, obstructions and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto." It is submitted that both the Rollerway and Norman Dams and the consequences of their construction and operation were thus excepted—both because they were uses and obstructions " heretofore permitted " and because they were " provided for by special agreement ".

In considering the meaning of these words, " heretofore permitted," it is clear that they should not be interpreted as being restricted to express permissions. The question has recently been before the Court in *Pigeon River Improvement, Slide & Boom Co.* v. *Charles W. Cox, Ltd.* (Reported in the United States Law Week. Vol. 1, No. 20, pp. 12-15.) The Court decided that the improvements on the Pigeon River constituted " structures and uses which had been permitted by the Parties prior to the Treaty of 1909" and consequently recognized by that treaty. It is true that the circumstances were dif-

ferent in detail in the Pigeon River case from those surrounding the building and maintenance of Rollerway Dam and Norman Dam. In the Pigeon River case the works had been constructed on the Minnesota side of the river, pursuant to authority granted by the State of Minnesota, and they corresponded to co-ordinated works in the Province of Ontario, constructed pursuant to authority derived from that Province. Neither the United States nor the Dominion of Canada, the appropriate permitting authorities, expressly permitted the construction or maintenance of the improvements. The works, however, had been constructed and maintained, without any protest from the federal authorities on either side of the international boundary, and no action had been taken by either federal authority that was inconsistent with a tacit but real permission. The circumstances were essentially the same in principle as those which existed in the presented instance. The old Norman Dam was built and controlled, up to the date of the Treaty of 1909, under the authority of the Province of Ontario. Neither the United States of America nor the Dominion of Canada expressly permitted the construction and maintenance of the Dam. On the other hand, neither the Government of the United States nor the Government of Canada took any action at any time that was inconsistent with a tacit but real permission. Indeed the action of the Government of the United States in urging a more effective control at Norman Dam can be regarded as cogent evidence of the reality of the tacit permission. It was certainly much stronger evidence of the tacit permission than any action by the Government of Canada in the Pigeon River case. Accordingly, following the principles underlying the decision of this Court in the Pigeon River case, it is submitted that the old Norman Dam must be considered as an obstruction

heretofore permitted and, consequently, as not coming under the provisions of Article III.

Moreover, the uses and obstructions resulting from the Rollerway and Norman Dams were excepted from the operation of the Treaty of 1909 because they were "provided for by special agreement". The Lake of the Woods Convention was obviously such a "special agreement", and, when made in 1925, its provisions thereupon became applicable to the pre-existing "uses, obstructions and diversions" resulting from the Rollerway and Norman Dams to the exclusion of the provisions of the Treaty of 1909.

Neither the construction placed upon Article II of the Treaty by the Circuit Court of Appeals in the majority opinion, nor the construction of the Treaty advanced in the preceding paragraph, are in any manner prejudicial to the rights of riparian proprietors in the United States. The fact that they had no remedy under Article II or that their case did not come under the provisions of Articles II, IV or VIII, does not mean that their rights were prejudiced in any way. The Treaty provided for governmental references under Article IX and the remedies thus available are ample and effective. They are illustrated, in concrete form, by the procedure for recovering past damages under the Lake of the Woods Convention and Enabling Legislation which resulted directly from the governmental reference under Article IX.

Further, neither interpretation is contrary to the terms of the Treaty. They are completely in accord both with a strict literal construction of the instrument and with the broad general scheme of the regime thereby established. It seems hardly necessary to argue that the constructions are unlikely to cause international misunderstanding. The interpretation placed upon the Treaty

in the dissenting opinion, departing as it does from the language of the instrument and conflicting with the whole structure of the international regime, under the Boundary Waters Treaty, 1909, would cause very serious international misunderstandings.

C.

Whether the Ruling of the Circuit Court of Appeals in this matter is inconsistent with the Lake of the Woods Convention 1925.

This point is raised in the Petitioners' Brief, on Certiorari, at pp. 23 and 24. It is apparently based upon the statement in the dissenting opinion of Booth, Circuit Judge (R. 437-438).

> "The rulings of the Court on the offers to prove and the charge of the Court were, it seems to me, contrary to the spirit, if not to the express provisions, of the treaty of 1925 and the Act of Congress for carrying it into effect.
>
> "The treaty provides (Article IX, supra):—
>
> 'The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.'
>
> "The statute above quoted (44 Stat. 617) provides for an ascertainment of damages to the landowners by reason of flowage prior to the treaty.
>
> "The rulings of the Court on the offers to prove and the charge of the Court, however, held in effect that as a matter of law there could be no such damages."

This statement seems to imply that the rulings of the Court on the offers to prove, held, in effect, that, as a matter of law, there could be no damages available to the landowners under Article IX of the Lake of the Woods Convention and under the enabling legislation.

It is submitted, with deference, that this view is based upon a complete misconception of the ruling of the

trial judge and of the relation between the past damage claims and the present proceedings.

It has already been pointed out, in the first section of the argument, that the Lake of the Woods Convention makes a sharp distinction between past damages and compensation for the acquisition of the flowage easements. This distinction is accentuated by the enabling legislation which provides for two entirely separate sets of proceedings. It is hardly necessary to argue that the High Contracting Parties, in concluding the Lake of the Woods Convention, did not intend to provide that the landowner should be paid twice for the same injury. The words used in the Convention plainly indicate that it was intended that they should be paid by the United States for past damages and that Canada was to furnish the funds, in whole or in part, to cover compensation for the acquisition of the flowage easements. To bring into account past damage claims in the present proceedings would inevitably lead to a miscarriage of justice and would defeat the manifest intention of the Convention.

Obviously, if the trial judge or the Circuit Court of Appeals in the majority opinion had purported to rule that the landowners had no right to compensation in the past damage proceedings, such a course would have been contrary to both the letter and the spirit of the Convention. No such action has, however, been found in the record, and any words that may even suggest a denial of the landowners' claims for past injuries must be construed in their settings, namely in cases in which the past damage claims were irrelevant considerations and in which the negativing of the existence of a claim against the Canadian Government at or prior to the date of the Convention, had no reference to the landowners' claims for redress in the past damage proceedings.

III

ANSWERS TO VARIOUS POINTS MADE IN PETITIONERS' BRIEF

1

In Part I of the Argument (supra pp. 16-19) it has been established that there never was and never could have been any purchaser of easements for reservoir use, except the expropriating authority.

At pages 30, 31, 36 and 37 of the Petitioners' Brief, there is a discussion of the trial Judge's refusal to permit the petitioners to prove that there was competition between the Ontario and the Manitoba power interests such that one or the other of these groups would have acquired the flowage easements if the Government had not undertaken to do so, and that it would have been entirely practical for either of these groups to have acquired all the flowage, through private negotiation and purchase. This argument would seem, at first impression, to weaken the position stated in the preceding paragraph. Upon analysis, however, it will appear that the trial Judge was right in rejecting such evidence.

It is clear that the evidence of competition between Ontario and Manitoba power interests is not a proper matter for expert or opinion testimony. If these power interests had been actually in the market for all of the United States titles which they could acquire, it should have been proved as a fact, and not by the opinion of experts testifying that it would seem probable that such was the fact. It is difficult to believe that any power company, or group of power promoters, could have afforded to pay special adaptability values, for any of

the innumerable titles, without knowing that all could be acquired. This could not possibly be known. Further, these Canadian power interests would have had no possible reason for paying any money for the acquisition of a single title in the United States, unless the owner of such title had a cause of action against the power companies. It is clear that the landowners had no cause of action against the companies at any stage (infra p. 127). Further, it is incredible that these interests would have paid money for the acquisition of any of the land titles or flowage easements, when it is recognized that, even if they had acquired all of the flowage rights on the entire shore of the Lake of the Woods, they would not have thus acquired the right to maintain a storage reservoir.

In these circumstances, it is submitted that the trial Judge was right in rejecting an offer to prove the assumed existence of such competition by expert or opinion testimony.

2

At pages 33 and 34 of the Petitioners' Brief, reference is made to the exclusion of statements which had been made in the course of the Hearings before the International Joint Commission, by representatives of the Winnipeg Power interests. It will be observed that these statements were made in the course of Hearings before a Commission which was to make recommendations with regard to the treatment of the Lake of the Woods problem as a whole. They do not suggest independent action by the power interests. They merely urge that generous provision for compensation should be recommended by the Commission and recognize that it would be just that this should ultimately be paid by power users.

The opinions of lawyers arguing before the International Joint Commission could not possibly be evidence of what Olson, Karlson and Brewster were entitled to recover in eminent domain proceedings in the United States, and it is submitted that the evidence was properly excluded (R. 117).

They are cited in the Petitioners' Brief as controverting the statement in the majority opinion that "it was not until the Convention of 1925 that there was any possibility of the landowner receiving any compensation for this taking of his land". It is submitted that they do not in any sense controvert the statement in the majority opinion. The learned Judges in the majority opinion did not contradict or overlook the fact that, for thirteen years preceding the date of the Convention, international negotiations and investigations had been pending with a view to the conclusion of a Convention of this character. It is clear that what the learned Judges meant was that there was no possibility of the landowners receiving compensation from any source other than proceedings resulting from the Convention.

3

At page 41 of the Petitioners' Brief, it is stated that the power interests had invested millions on the assumption that the use of riparian lands for flowage purposes would continue. If true, it does not follow that the power interests would have invested more money in the acquisition of riparian rights in the United States.

4

At page 51 of the Petitioners' Brief, reference is made to Attorney General v. De Keysers Royal Hotel Ltd. L.R. (1920) A.C. 508. In that case Lord Dunedin made the following statement:—

> "The other point is as to the remedy. I am of the opinion that a Petition of Right lies, for it will lie when in consequence of what has been legally done any resulting obligation emerges on behalf of the subject. The Petition of Right does no more and no less than to allow the subject in such cases to sue the Crown. It is otherwise when the obligation arises from tort, but, as already insisted on, what was done here, so far as the taking of the premises was concerned, was perfectly legal." (at pp. 530, 531).

It does not follow that Petition of Right would have been available against the Crown for flooding prior to the date of the Convention. The principle as stated by Lord Dunedin cannot be questioned, but, in order that it may be applicable, there must be an obligation emerging on behalf of the injured party, and it must be a legal obligation of which the Courts may take cognizance. The landowner's position is set forth in Appendix "G", at pages 135 et seq. of this brief. It is clear that there was no legal obligation, cognizable by the Courts, that could be the basis of a Petition of Right by the owners of riparian lands in Minnesota. The position as established by the decision in Muskoka Mill Co. v. the Queen, 28 Grant 563, (infra p. 130), has not been affected by the decision of the House of Lords in the former case.

5

At page 20 of the Petitioners' Brief, it is stated that one of the reasons advanced in the majority opinion of the Circuit Court of Appeals was that, where the power of eminent domain is exercised, special adaptability must be left out of consideration. This is not a fair statement.

The position taken by the Court was that, if the exercise of the power of eminent domain was essential in order to acquire all the titles, special adaptability must be left out of consideration.

6

At page 60 of the Petitioners' Brief, it is argued that the potential use should not be considered as too remote and speculative, because the union of petitioners' lands was an accomplished fact. The so-called union of the lands merely refers to the physical existence of an actual reservoir which had existed as far back as 1887. This matter is discussed in this brief at pp. 82-85, and particularly at page 83. The physical flooding of the lands is not the important question. The question is whether anyone would have paid money to acquire titles in the United States. As argued at the pages cited, and elsewhere in this brief, no one would have paid for such titles, because payment was unnecessary, and because the acquisition of the titles would not have given the purchaser the right to regulate the levels in the interests of power, and the legal right to the continued existence of the reservoir and continued privilege of the regulation.

7

At pages 77 and 78 of the Petitioners' Brief it is argued that the reasons advanced in the majority opinion are inconsistent with one another. It is contented that the finding that petitioners had no rights of redress and were "helpless" in the matter, is inconsistent with holding that the exercise of eminent domain was necessary to unify the titles.

It is submitted that there is no inconsistency between these views. It has been established elsewhere in this brief that the petitioners were helpless in the sense that

they could not stop the flooding, and had no rights of redress. On the other hand, the exercise of eminent domain was necessary to unify the titles. In concluding the Convention of 1925, the two countries decided that it was fair that property owners should be paid for the damage actually done to them, both for past damages and for the acquisition of flowage easements. Without such a convention or treaty, such payment would never have been made, and it was only by the conclusion of such a convention, implemented by appropriate legislation and the exercise of the power of eminent domain, that the titles could be unified and a legally constituted reservoir established. Dependable levels of the Lake and dependable flow in the Winnipeg River, based upon regulation of the Lake levels—such as would justify expenditures, dependent upon such levels and flow, and such as would create economic values, as a result of such regulation—did not exist until after the conclusion of the Convention of 1925 and the enactment of the implementing legislation in the United States.

IV.

CONCLUSION

The preceding argument is submitted on behalf of the Government of Canada as establishing that the petitioner is not entitled to compensation on the basis of special adaptability of his lands for reservoir purposes, in the existing circumstances. There never was, and never could have been, any purchaser of easements for reservoir use, except the expropriating authority. The expropriating authority, in this particular instance, involved the two Governments acting conjointly and exercising the treaty-making power, and the Government of the United States, pursuant to such joint action, exercising the power of eminent domain. Further, the obstacles in the way of reservoir construction, by private enterprise, made the possibility of a reservoir use of the lands too remote and uncertain to constitute an element of value. It is also confidently submitted that the position taken by the Trial Judge and by the Circuit Court of Appeals is completely in accord with the different treaties and conventions which affect this situation.

In this brief, the detailed questions relating to the admission or rejection of evidence have not been discussed, but they are completely dealt with in the brief of the Government of the United States. It does, however, appear that the rejections of evidence complained of all fall under one central principle. It is submitted that the petitioner is not entitled to compensation upon the ground of special adaptability and that, therefore,

the evidence in question adduced for the purpose of establishing values based upon special adaptability, and which was relevant only to that issue, was properly rejected by the Trial Judge.

Respectfully submitted,

GEORGE WHARTON PEPPER,
Philadelphia;

JOHN E. READ,
Ottawa;
Of counsel for the Government of Canada.

JANUARY, 1934.

APPENDICES

While these appendices are designed, for the convenience of the Court, to set out the respective matters which are deemed to be helpful in the consideration of the contention presented on behalf of the Government of Canada in these appeals; it is requested that such appendices shall not be construed as barring reference to and consideration of any other evidence on record in these cases.

APPENDIX "A"

BOUNDARY WATERS TREATY

Treaty Between His Majesty and the United States of America Relating to Boundary Waters and Questions Arising Along the Boundary Between Canada and the United States.

Signed at Washington, January 11, 1909.

(Ratifications exchanged at Washington, May 5, 1910)

. . . . . .

Preliminary Article

For the purpose of this Treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their

natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.

. . . . . .

ARTICLE II

Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other, as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto.

It is understood, however, that neither of the High Contracting Parties intends by the foregoing provision to surrender any right which it may have to object to any interference with or diversion of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary.

Article III

It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission.

The foregoing provisions are not intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbours, and other governmental works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line and do not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes.

Article IV

The High Contracting Parties agree that, except in cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions

in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission.

It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.

. . . . . .

ARTICLE VIII

This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this Treaty the approval of this Commission is required, and in passing upon such cases the Commission shall be governed by the following rules and principles which are adopted by the High Contracting Parties for this purpose:

The High Contracting Parties shall have, each on its own side of the boundary, equal and similar rights in the use of the waters hereinbefore defined as boundary waters.

The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:

(1) Uses for domestic and sanitary purposes;

(2) Uses for navigation, including the service of canals for the purposes of navigation;

(3) Uses for power and for irrigation purposes.

The foregoing provisions shall not apply to or disturb any existing uses of boundary waters on either side of the boundary.

The requirement for an equal division may in the discretion of the Commission be suspended in cases of temporary diversions along boundary waters at points where such equal division can not be made advantageously on account of local conditions, and where such diversion does not diminish elsewhere the amount available for use on the other side.

The Commission in its discretion may make its approval in any case conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed, and in such cases may require that suitable and adequate provision, approved by the Commission, be made for the protection and indemnity against injury of any interests on either side of the boundary.

In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.

The majority of the Commissioners shall have power to render a decision. In case the Commission is evenly divided upon any question or matter presented to it for decision, separate reports shall be made by the Commissioners on each side to their own Government. The High Contracting Parties shall thereupon endeavour to agree upon an adjustment of the question or matter of difference, and if an agreement is reached between them, it shall be reduced to writing in the form of a protocol, and shall be communicated to the Commissioners, who shall take such further proceedings as may be necessary to carry out such agreement.

Article IX

The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

Such reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award.

The Commission shall make a joint report to both Governments in all cases in which all or a majority of the Commissioners agree, and in case of disagreement the minority may make a joint report to both Governments, or separate reports to their respective Governments.

In case the Commission is evenly divided upon any question or matter referred to it for report, separate reports shall be made by the Commissioners on each side to their own Government.

APPENDIX "B"

CONVENTION TO REGULATE THE LEVEL OF THE LAKE OF THE WOODS

Signed at Washington, February 24, 1925.

(Ratifications exchanged at Washington, July 17, 1925.)

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, in respect of the Dominion of Canada, and the United States of America,

Desiring to regulate the level of Lake of the Woods in order to secure to the inhabitants of Canada and the United States the most advantageous use of the waters thereof and of the waters flowing into and from the lake on each side of the boundary between the two countries; and

Accepting as a basis of agreement the recommendations made by the International Joint Commission in its final report of May 18, 1917, on the Reference concerning Lake of the Woods submitted to it by the Governments of Canada and the United States of America,

Have resolved to conclude a Convention for that purpose and have accordingly named as their plenipotentiaries:—

His Britannic Majesty, in respect of the Dominion of Canada: The Honourable Ernest Lapointe, K.C., a Member of His Majesty's Privy Council for Canada and Minister of Justice in the Government of that Dominion; and

The President of the United States of America: Charles Evans Hughes, Secretary of State of the United States;

Who, after having communicated to each other their full powers, found in good and due form, have agreed as follows:—

ARTICLE 1

In the present Convention, the term "level of Lake of the Woods" or "level of the lake" means the level of the open lake unaffected by wind or currents.

The term "Lake of the Woods watershed" means the entire region in which the waters discharged at the outlets of the Lake of the Woods have their natural source.

The term "sea-level datum" means the datum permanently established by the International Joint Commission at the town of Warroad, Minnesota, of which the description is as follows:—

> "Top of copper plug in concrete block carried below frost line, and located near fence in front of and to the west of new schoolhouse. Established October 3, 1912. Elevation, sea-level datum, 1068·797."

"The International Joint Commission" means the Commission established under the Treaty signed at Washington on the 11th day of January, 1909, between His Britannic Majesty and the United States of America, relating to boundary waters and questions arising between the United States and Canada.

ARTICLE 2

The level of Lake of the Woods shall be regulated to the extent and in the manner provided for in the present Convention, with the object of securing to the inhabitants of Canada and the United States the most advantageous use of the waters thereof and of the waters flow-

ing into and from the lake on each side of the boundary between the two countries for domestic and sanitary purposes, for navigation purposes, for fishing purposes, and for power, irrigation and reclamation purposes.

ARTICLE 3

The Government of Canada shall establish and maintain a Canadian Lake of the Woods Control Board, composed of engineers, which shall regulate and control the outflow of the waters of the Lake of the Woods.

There shall be established and maintained an International Lake of the Woods Control Board composed of two engineers, one appointed by the Government of Canada and one by the Government of the United States from their respective public services, and whenever the level of the lake rises above elevation 1061 sea-level datum or falls below elevation 1056 sea-level datum the rate of total discharge of water from the lake shall be subject to the approval of this Board.

ARTICLE 4

The level of Lake of the Woods shall ordinarily be maintained between elevation 1056 and 1061·25 sea-level datum, and between these two elevations the regulations shall be such as to ensure the highest continuous uniform discharge of water from the lake.

During periods of excessive precipitation the total discharge of water from the lake shall, upon the level reaching elevation 1061 sea-level datum, be so regulated as to ensure that the extreme high level of the lake shall at no time exceed elevation 1062·5 sea-level datum.

The level of the lake shall at no time be reduced below elevation 1056 sea-level datum except during periods of

low precipitation and then only upon the approval of the International Lake of the Woods Control Board and subject to such conditions and limitations as may be necessary to protect the use of the waters of the lake for domestic, sanitary, navigation and fishing purposes.

ARTICLE 5

If in the opinion of the International Lake of the Woods Control Board the experience gained in the regulation of the lake under Articles 3 and 4, or the provision of additional facilities for the storage of waters tributary to the lake, demonstrates that it is practicable to permit the upper limit of the ordinary range in the levels of the lake to be raised from elevation 1061·25 sea-level datum to a higher level and at the same time to prevent during periods of excessive precipitation the extreme high level of the lake from exceeding elevation 1062·5 sea-level datum, this shall be permitted under such conditions as the International Lake of the Woods Control Board may prescribe. Should such permission be granted, the level at which under Article 3 the rate of total discharge of water from the lake becomes subject to the approval of the International Lake of the Woods Control Board may, upon the recommendation of that Board and with the approval of the International Joint Commission, be raised from elevation 1061 sea-level datum to a correspondingly higher level.

ARTICLE 6

Any disagreement between the members of the International Lake of the Woods Control Board as to the exercise of the functions of the Board under Articles 3,

4 and 5 shall be immediately referred by the Board to the International Joint Commission, whose decision shall be final.

ARTICLE 7

The outflow capacity of the outlets of Lake of the Woods shall be so enlarged as to permit the discharge of not less than forty-seven thousand cubic feet of water per second (47,000 c.f.s.) when the level of the lake is at elevation 1061 sea-level datum.

The necessary works for this purpose, as well as the necessary works and dams for controlling and regulating the outflow of the water, shall be provded for at the instance of the Government of Canada, either by the improvement of existing works and dams or by the construction of additional works.

ARTICLE 8

A flowage easement shall be permitted up to elevation 1064 sea-level datum upon all lands bordering on Lake of the Woods in the United States, and the United States assumes all liability to the owners of such lands for the costs of such easement.

The Government of the United States shall provide for the following protective works and measures in the United States along the shores of Lake of the Woods and the banks of Rainy River in so far as such protective works and measures may be necessary for the purposes of the regulations of the level of the lake under the present convention; namely, the removal or protection of buildings injuriously affected by erosion, and the protection of the banks at the mouth of Warroad river where subject to erosion, in so far in both cases as the erosion results from fluctuations in the level of the lake;

the alteration of the railway embankment east of the town of Warroad, Minnesota, in so far as it may be necessary to prevent surface flooding of the higher lands in and around the town of Warroad; the making of provision for the increased cost, if any, of operating the existing sewage system of the town of Warroad, and the protection of the waterfront at the town of Baudette, Minnesota.

ARTICLE 9

The Dominion of Canada and the United States shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.

Each shall likewise assume responsibility for any damage or injury which may hereafter result to it or to its inhabitants from the regulation of the level of Lake of the Woods in the manner provided for in the present Convention.

ARTICLE 10

The Governments of Canada and the United States shall each be released from responsibility for any claims or expenses arising in the territory of the other in connection with the matters provided for in Articles 7, 8 and 9.

In consideration, however, of the undertakings of the United States as set forth in Article 8, the Government of Canada shall pay to the Government of the United States the sum of two hundred and seventy-five thousand dollars ($275,000) in currency of the United States. Should this sum prove insufficient to cover the cost of such undertakings one-half of the excess of such cost

over the said sum shall, if the expenditure be incurred within five years of the coming into force of the present Convention, be paid by the Government of Canada.

ARTICLE 11

No diversion shall henceforth be made of any waters from the Lake of the Woods watershed to any other watershed except by authority of the United States or the Dominion of Canada within their respective territories and with the approval of the International Joint Commission.

ARTICLE 12

The present Convention shall be ratified in accordance with the constitutional methods of the High Contracting Parties and shall take effect on the exchange of the ratifications, which shall take place at Washington or Ottawa as soon as possible.

In faith whereof the above named plenipotentiaries have signed the present Convention and affixed their respective seals.

Done in duplicate at Washington, the 24th day of February, 1925.

(Seal) ERNEST LAPOINTE.

(Seal) CHARLES EVANS HUGHES.

APPENDIX "C"

PROTOCOL ACCOMPANYING CONVENTION TO REGULATE THE LEVEL OF LAKE OF THE WOODS

. . . . . .

2

Should it become necessary to set up a special tribunal to determine the cost of the acquisition of the flowage easement in the United States provided for in Article 8 of the Convention, the Government of Canada shall be afforded an opportunity to be represented thereon. Should the cost be determined by means of the usual judicial procedure in the United States, the Government of Canada shall be given the privilege of representation by counsel in connection therewith.

. . . . . .

APPENDIX "D"

ACT OF CONGRESS 1926

(Public—No. 269—69th Congress)

(H.R. 9872)

An Act To Carry into effect provisions of the convention between the United States and Great Britain to regulate the level of Lake of the Woods concluded on the 24th day of February, 1925.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War be, and he is hereby, authorized and directed to acquire, as soon as practicable after the enactment of this Act, by purchase or by condemnation, in accordance with the provisions of the Act entitled "An Act to authorize condemnation of land for sites of public buildings, and for other purposes," approved August 1, 1888, the flowage easements up to elevation one thousand sixty-four sea-level datum upon all lands in the United States bordering on the Lake of the Woods and such lands or interests therein as are necessary to provide for protective works and measures in the United States along the shores of the Lake of the Woods and the banks of the Rainy River as specified in article 8 of the convention signed at Washington on the 24th of February, 1925, between the Governments of the United States and Great Britain, providing for the regulation of the level of the Lake of the Woods.

In proceeding by condemnation for acquiring such flowage easements on any tract of land any benefit to the remainder of the tract or the property thereon de-

rived from such easement shall be considered and damages shall be awarded accordingly.

Sec. 2. The protective works and measures provided for in article 8 of the convention, or such thereof as the Secretary of War may deem necessary for the protection of the property rights and interests of the inhabitants of the territory affected, shall be constructed, or carried out, under the direction of the Secretary of War and all moneys which may be paid by the Government of Canada to the Government of the United States under article 10 of the convention are hereby appropriated and made available for expenditure by the Secretary of War for the construction of such works, and the carrying out of such measures, and for the acquisition of easements, lands, and interests therein as provided in section 1 of this Act.

Sec. 3. The Secretary of War is hereby authorized and directed to cause to be investigated, as soon as practicable, all claims for damages caused, prior to the acquisition of flowage easements under this Act, to the inhabitants of the United States by fluctuation of the water levels of the Lake of the Woods due to artificial obstructions in outlets of said lake, and after due notice and opportunity for hearing, shall ascertain and determine the loss or injury, if any, that may have been sustained by the respective claimants and to report to Congress for its consideration the amount or amounts he may find to be equitably due such claimants, together with a statement in each case of the substantial facts upon which the conclusion is based: *Provided*, That all claims not presented to the Secretary of War under this provision prior to the expiration of six months from the date of the passage of this Act shall not be considered by him and shall be forever barred.

Approved May 22, 1926.

APPENDIX "E"

ACT OF CONGRESS 1928

(Public—No. 280—70th Congress)

(H.R. 10884)

An Act To amend the Act entitled "An Act to carry into effect provisions of the convention between the United States and Great Britain to regulate the level of Lake of the Woods concluded on the 24th day of February, 1925," approved May 22, 1926.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first paragraph of section 1 of the Act entitled "An Act to carry into effect provisions of the convention between the United States and Great Britain to regulate the level of Lake of the Woods concluded on the 24th day of February, 1925," approved May 22, 1926, is amended to read as follows:

"That the Secretary of War be, and he is hereby, authorized and directed to acquire, as soon as practicable after the enactment of this Act, by purchase or by condemnation, in accordance with the provisions of the Act entitled, 'An Act to authorize condemnation of land for sites for public buildings, and for other purposes,' approved August 1, 1888, and in accordance with the constitutional provisions of the State of Minnesota which provide that private property shall not be taken, destroyed, or damaged for public use without just compensation therefor first paid or secured, the flowage easements up to elevation one thousand and sixty-four sea-level datum upon all lands in such State bordering on the Lake of the Woods, Warroad River, and Rainy River, and such lands or interests therein as are necessary to provide for the protective works and measures in such State along the shores of the Lake

of the Woods and the banks of the Warroad River and the Rainy River as specified in article 8 of the convention signed at Washington on the 24th day of February, 1925, between the Governments of the United States and Great Britain providing for the regulation of the level of the Lake of the Woods."

Sec. 2. Section 1 of such Act approved May 22, 1926, is amended by adding at the end thereof a new sentence to read as follows:

"In such condemnation proceedings fees and mileage of witnesses shall be assessed against the United States to the same extent in any given case as if the proceeding had been initiated by a private corporation."

Sec. 3. Section 3 of such Act approved May 22, 1926, is amended to read as follows:

"Sec. 3. The Secretary of War is hereby authorized and directed to cause to be investigated, as soon as practicable, all claims for damages caused, prior to the acquisition of flowage easements under this Act, to the inhabitants of the United States by fluctuation of the water levels of the Lake of the Woods due to artificial obstructions in outlets of said lake, and after due notice and opportunity for hearing, shall ascertain and determine the loss or injury, if any, that may have been sustained by the respective claimants and to report to Congress for its consideration the amount or amounts he may find to be equitably due such claimants, together with a statement in each case of the substantial facts upon which the conclusion is based: *Provided*, That all claims not presented to the Secretary of War under this provision prior to the expiration of thirty days from the date of the passage of this amendatory Act, shall not be considered by him and shall be forever barred."

Approved, April 18, 1928.

APPENDIX "F"

EXCERPTS FROM THE FINAL REPORT OF THE INTERNATIONAL JOINT COMMISSION

(Foot-notes omitted).

Pages 16-17-18

"The first attempt to exercise a measure of control over the level of the Lake of the Woods was made 30 years ago. It appears from the evidence submitted at public hearings and from our investigation, that because of the low stages of water in the lake for some time prior to 1887, the interest of navigation, then considerable on the Canadian side, was seriously affected. For the purpose of improving this condition, and mainly for the benefit of navigation, the Dominion Government authorized the construction of a dam, known as the Rollerway Dam, in the western outlet of the lake. To aid in the accomplishment of this purpose the Government appropriated the sum of $7,000.

"From the evidence it also appears, and this is not disputed, that the construction of the Rollerway Dam had the effect of raising the natural level of the lake an average of 1·5 feet during the years 1893 to 1898 for which continuous records are available.

"Some of the evidence obtained, including two records of water levels given in table 6, page 24, Report of the Consulting Engineers, indicates that when first built this dam raised the level of the lake substantially 3 feet.

"In 1893-1895, under authority of the Government of Ontario, another dam known as the Norman Dam was built by the Keewatin Power Company (Ltd.), in the Winnipeg River about a mile below the Rollerway Dam. The Norman Dam consists of a rock fill and 20 masonry piers with sluices, controlled by means of stop logs. It was originally intended for power development, but the project was never completed. The stop logs were not placed until 1898, when, under a contract with the Keewatin Power Company the Provincial Government paid the company $4,000 to be used in providing the necessary

stop logs, and at the same time secured the right, subject to cancellation by either party upon one month's notice, to thereafter control the dam for the benefit of navigation.

"Since November 19, 1898, the dam has been so controlled by the Provincial Government under this contract.

"The contract also provided that in case of cancellation at the request of the company, 'It shall nevertheless be the duty of the company to maintain the water at ordinary summer level for such purposes as aforesaid at all proper time and times thereafter.' In the contract liability for damage resulting from raising the lake above ordinary summer level is covered by the following statement:—

"'It is also agreed that the commissioner is not to be responsible for damages occasioned by reason of the water being raised higher than ordinary summer level unless the same is raised for the purpose of, and at the instance of, the Government or by their servants or agents.'

"Although the Rollerway Dam, constructed in 1887-88, was removed in 1899, the effect of the construction and maintenance of the Norman Dam upon the level of the Lake of the Woods was similar to that of the Rollerway Dam, but more marked, in that it maintained the mean lake level about 3·5 feet above what it would have been under natural conditions. The increase over the levels which would have prevailed with the outlets in a state of nature has varied from 0·9 foot in 1899 to 6·3 feet in 1913."

Pages 18-19

"*Warroad Harbour Improvement*

"In 1902, on the basis of surveys of Warroad River, authorized by the Congress of the United States and made by engineers of the United States War Department in 1899 to 1900, a project was adopted by Congress for the improvement of Warroad Harbour so as to provide a 7-foot channel. In the plans for this improvement, all depths were reduced to what the War Department later referred to as the 'normal' level of the lake; that is, a stage of 7·2 feet on the Warroad gauge, corresponding to 1,060·8, sea-level datum.

"This is the stage which prevailed on the lake at the beginning of the survey in December, 1899. In each navi-

gation season between 1901 and 1904 the lake level fell somewhat below the stage of 1,060·8 and in 1904 it reached that stage for only a few days.

"When the project was extended by Congress early in 1905, the United States engineers in charge, knowing of the existence of a dam in one of the outlets of the lake by means of which the level could be to some extent controlled, believed that through co-operation with the proper Canadian authorities the dam could be so operated as to secure a level more satisfactory to the maintenance of the projected depths in Warroad Harbour than the stage which had prevailed since the adoption of the project.

"As a consequence in May, 1905, the Government of the United States suggested to the Government of the Dominion of Canada that the Norman Dam be so operated as to prevent the level of the Lake of the Woods from falling below the datum of 7·2 on the Warroad gauge, i.e. 1,060·8, sea-level datum.

"After investigation and consideration of the matter, the Canadian Government concluded that the request of the United States Government could not be granted because the maintenance of the minimum stage of 7·2 would result in injury to important industries at Keewatin and Kenora in time of high water, and also because it would be impossible to maintain a minimum stage of 7·2 during low water without constructing a dam in the eastern outlet of the lake.

"This conclusion was never officially communicated to the Government of the United States. In 1906 the eastern outlet of the lake was completely closed by the construction of a power plant by the town of Kenora.

Pages 26-27

"Regulation desirable

"A careful study of the physical data submitted in the report of the consulting engineers, and a consideration of all the interests involved, lead to the conclusion that it is practicable and desirable to maintain the lake at a relatively uniform level throughout all ordinary seasons, but that in order to secure the most advantageous use of the waters flowing from the lake it is necessary to permit a draft on the water stored in the lake, in excess of 2 or 3 feet,

during periods of exceptional drought occurring about once in 20 years, for the purpose of maintaining a satisfactory outflow; and also to permit the storage of some of the flood water above the ordinary maximum level during occasional years of excessive flood inflow.

"*The recommended level*

"Because of the diverse requirements of the various interests, it is an impossibility to recommend a level or regimen of levels which would be of equal desirability to all these interests. After careful consideration of all the factors entering into this problem, the commission is of the opinion that, subject to proper compensation and protection being provided, for property and interests injuriously affected, the most advantageous use of the waters of the Lake of the Woods and of the waters flowing into and from that lake and of the shores and harbours of the lake, can be secured by maintaining the level of the lake at an ordinary maximum stage of 1,061·25 sea-level datum. Whenever the level of the lake rises to 1,061·0, sea-level datum, water shall be wasted or conserved as directed by the commission under the system of international supervision and control hereinafter recommended, and between 1,056 and 1,061 water may be drawn from the lake by the appropriate authority in Canada for the benefit of Canadian interests, provided, however, that the level of the lake shall not, even toward the end of a series of dry years, be drawn below 1,056 sea-level datum, without the approval of this commission, and then only on such terms and conditions as it may impose."

APPENDIX "G"

NOTE CONCERNING THE LANDOWNERS CLAIM FOR REDRESS AGAINST CANADIAN AGENCIES IN CANADA AND UNDER THE CANADIAN LAW

In the dissenting opinion of Mr. Justice Booth, the following statement is made:—

> "(3) Nor was the situation of the landowner as to recovery of such flowage use value as damages from the trespassers one of mere hopeless speculation. Were this the case, it would be a reproach to both Governments concerned. On the contrary, it is, in my opinion, a reasonable and safe conclusion that once the facts were established, the landowner could get compensation in damages in the courts of Canada, if the trespass had been committed by private parties; and probably could obtain compensation by Petition of Right, if the flowage use had been taken by authority of the Canadian Government (*See* Halsbury's Laws of England, Vol. 1, p. 17, paragraphs 21, 22, 23 and 24; and Vol. 10, pp. 26-30; also Vol. 2 D.L.R. (1928), p. 625, annotation "Petition of Right" by Arthur S. Bourinot); and certainly he could obtain redress through diplomatic action between the two Governments.
>
> "Such, substantially, was the situation, in my judgment, when the present condemnation proceedings were brought." (R. 433).

It will be convenient to examine these points in order. They are, shortly:—

(1) That the landowner could get compensation and damages in the courts of Canada if the trespass had been committed by private parties;

(2) That the landowner could obtain compensation by Petition of Right if the flowage use had been taken by authority of the Canadian Government.

1. Whether the landowner could obtain compensation and damages in the courts of Canada if the trespass had been committed by private parties.

This point is based upon the assumption that the water levels of the Lake of the Woods are controlled at Norman Dam by private parties.

The history of the regulation of the level of the Lake of the Woods, by control at Norman Dam at the outlet in Canada, has already been set forth in this brief (pp. 7 to 10, 55 to 64). It has thus been established, beyond all possible doubt, that the levels of the Lake of the Woods have, throughout the whole period, been controlled and regulated by the Crown, whether acting through the Commissioner of Public Works of Ontario, or through agencies of the Government of Canada and the Government of Ontario, jointly. If any trespass has at any time been committed as against the landowner in question (which is not admitted), the Keewatin Power Company could not be legally responsible. The act in question was the act of the Crown and not of the Company. The landowner's lands were flooded as a result of the regulation and control of levels by the Commissioner of Public Works. That control and regulation were based upon appropriate statutory authority which will be discussed later. The Company was powerless to prevent or influence in any way the control and regulation of the levels of the Lake by the Commissioner or the consequental flowage of the landowner's lands. There is no principle of law, recognized in Canada, that would justify an action against the Company based upon injuries resulting from the control and regulation of the levels of the Lake by the Commissioner of Public Works, even although the instrument used for such control and regulation was a dam built by the Company.

A question, involving similar principles, was considered in a case in the Judicial Committee of the Privy Council, *John Stirrett and Sons v. Kaministiquia Power Co. Ltd.* (1930) 1 D.L.R. 445. In that case, the dam in question had been constructed by the Crown and paid for out of public funds. The control of the dam was entrusted by the Minister of Public Works to the Hydro-Electric Commission, but the actual regulation of the water was left in the hands of the respondent company. While the respondent company, through its servants, was performing the manual acts required for control and regulation of the waters above the dam, it was at all times doing these acts subject to the direction, first, of the Hydro-Electric Commission and, later, of the Department of Public Works and the Departmnt of Lands and Forests. Their Lordships ruled that, in these circumstances, an action based upon wrongful control and regulation was misdirected as against the respondent company.

2. Whether the landowner could obtain compensation by Petition of Right if the flowage use had been taken by authority of the Canadian Government.

It is assumed that by the words, "if the flowage use had been taken by the authority of the Canadian Government" the learned Circuit Judge intended to refer to the control and regulation of lake levels by Canadian governmental agencies. There is no indication in the

record and no suggestion that a flowage use was ever taken by the Canadian Government or by any other body or authority. There is, however, the admitted fact that for about thirty years preceding the taking of the lands in question, the levels of the lake were regulated either indirectly or directly by governmental agencies in the interests primarily of navigation and also, at certain times, secondarily, in the interests of power and other activities.

The claim, if any, that the landowner in question might have presented in the Canadian courts would be a claim to the effect that the levels of the lake had been regulated in such manner that his lands were injured by flooding, drying or erosion. His proceedings would be in the nature of trespass, or trespass on the case, and they would be based on the theory that it was wrong for the Crown to effect any disturbances in the natural levels of the lake. The proceedings would necessarily be tortious in their character. There is no suggestion in the record of any contract on which the Crown could be sued. There is no suggestion that the Crown had taken possession of the landowners lands and there is no suggestion of any statutory provision creating a right of redress.

When the position of the landowner is examined, it will be seen that his possible claims might have been as follows:—

(*a*) A claim by Petition of Right against the Crown for damages caused to his land.

(*b*) A claim against the servant of the Crown for damages caused to his lands.

(*c*) A claim by Petition of Right against the Crown for compensation, upon the theory that the action of the Crown in so regulating levels

amounted to a compulsory taking of a flowage easement.

It is unnecessary to consider the period from 1887-1898 when the levels of the Lake of the Woods were regulated by Rollerway dam. It is sufficient to consider the period during which levels were regulated by the old Norman Dam. The possible claims can be considered in order:—

(a) *A claim by Petition of Right against the Crown for damages caused to the landowner's land.*

The short answer to such a claim is that no claim for way of Petition of Right can be made against the Crown in tort. An examination of the authorities cited by the learned Circuit Judge fails to disclose any instance of a successful Petition of Right based on a tortious claim, apart, of course, from claims based upon statutes creating such a right.

In Canada, under the provisions of Section 19 of the Exchequer Court Act, in certain special circumstances, a Petition of Right will lie for tort, particularly under Subsection (*b*), for damage to property injuriously affected by the construction of a public work; and under Subsection (*c*) for death or injury to a person or property, resulting from the negligence of an officer or servant of the Crown, while acting within the scope of his duties, upon a public work.

The landowner in question could not base his claim upon either of these grounds. There is no suggestion of negligence in this case, and consequently it could not be brought under the terms of Subsection (*c*). None of his property was expropriated for the erection of the public work, so that the case could not be brought under Subsection (*b*). It is well settled that claims for compensation, based upon injurious affection arising out of the

use, as distinct from the construction of a work, can only be supported when a part of the claimant's land is being expropriated for the work. The claim is then limited to injurious affection to the remaining land, occasioned by the user of that part of the claimant's land upon which the work is constructed. (*Sisters of Charity v. The King*, L.R. (1922), 2 A.C. 315).

There are no corresponding statutory provisions whereby a claim, tortious in character, can be advanced by Petition of Right against the Crown in right of the Province of Ontario, under the legislation of that Province.

The position under the law in force in Ontario is set forth in the following quotation from the Canadian Encyclopedic Digest, Ontario, Vol. 8, 530. Referring to the Ontario rules, it is stated,—

> "The rules do not authorize any relief against the Crown for a tort committed by a servant of the Crown, thus differing from the Dominion Exchequer Court Act."

The Ontario position is also exemplified by the decision of Spragge C. in *Muskoka Mill Co.* v. *The Queen*, (28 Grant 563). The Crown had built a temporary dam and, subsequently, a permanent dam in the outlet of Muskoka Lakes, in aid of navigation. The company brought a Petition of Right, alleging that the dam had deprived the claimants of waters for their mill below. It was held by the Chancellor that the claim was tortious in its character, and that, consequently, a Petition of Right did not lie. It was pointed out that the suppliant's redress, if any, would be either by action against the servants of the Crown or by proceedings under the Public Works Act.

Accordingly, it is clear that the landowner, in the present case, had no statutory right to proceed by Petition of Right and that he would be debarred by the common law principle set forth above, namely, that no claim by Petition of Right would lie against the Crown in tort.

(*b*) *A claim against the servant of the Crown for damages caused to the landowner's land.*

In considering whether a valid claim would exist against the servant of the Crown for damages caused to the landowner's land, two points arise, namely, whether the action of the Crown in providing for the completion of the dam and the regulation of levels thereby, was authorized by Statute; and if not, whether the landowner's cause of action against the servant of the Crown was barred by lapse of time.

In the first place, it is necessary to refer to the provisions of the Public Works Act, being Chap. 37 of the Revised Statutes of Ontario, 1897. The relevant sections of this statute are set forth in a note for convenient reference (infra p. 137 to 139).

It is clear that the action of the Government of the Province in completing the dam and operating it in order to control levels, was authorized by the terms of Sections 14 and 18 of the Act. Section 18, indeed, expressly provides for cases where public works are completed at the expense of the Province, and provides that they shall be subject to the control of the Department and subject to the provisions of the Act. Accordingly, the action of the Provincial Government and of the Commissioner of Public Works with respect to Norman Dam, had statutory authority which would justify the operation of the dam for the purpose of improving the navigation of the Lake of the Woods, and no action

would lie against the servant of the Crown who actually carried out the work of regulation and control.

Further, even if the landowner in question had a right of action against the servant of the Crown, such right was barred by the Statute of Limitations and by the acquisition of a flowage easement by the Crown in right of the Province of Ontario, upon the expiration of twenty years of actual user.

(c) *A claim by Petition of Right against the Crown for compensation upon the theory that the action of the Crown in so regulating the levels amounted to a compulsory taking of a flowage easement.*

A question might arise as to whether the landowner could have presented a Petition of Right against the Crown for compensation, upon the theory that the action of the Crown in regulating the levels amounted to a compulsory taking of a flowage easement. When the Crown has not taken the steps required by the legislation under which compensation may be claimed, with a view to expropriation, it is not open to the landowner to bring a Petition of Right upon the theory that there has been an expropriation.

This point was decided in *Yates* v. *The King* (20 Ex. C.R. 175). The decision in this case followed arguments on points of law raised in the pleadings. The suppliant, by his Petition of Right, claimed to be the owner of certain lands in the Town of New Liskeard, which were overflowed and flooded as a result of the construction, in 1912, of a dam at the southern end of Lake Temiskaming, by the Department of Public Works of the Dominion of Canada.

Audette J. stated in his judgment,—

> "The action is for the recovery of damages to land and is, therefore, in its very essence one founded in tort.

> Apart from breach of contract or from special statutory authority, no such action will lie against the Crown . . ."
>
> "The respondent, in the present case, has not expropriated (The Expropriation Act, R.S.C. 1906, ch. 143, Sec. 2, Subsection *f*, Sec. 3) the easement to flood the suppliant's land, and it therefore follows that the Court has no jurisdiction to entertain the claim under The Expropriation Act."

Muskoka Mill Co. v. *The Queen*, cited above, may be regarded as authority for the same point under the provincial laws.

At first sight the statement by Cassels J., in *Brown* v. *The King* (12 Ex. C.R. 463) that "the effect of this dam was to expropriate an easement over the meadow lands (1037 acres) of flooding," might appear to be inconsistent with this view. It may be noted, however, that in this case the Crown had taken steps to expropriate the suppliant's land and the Petition of Right and the Information by the Crown in expropriation proceedings were tried together, so that the statement by Mr. Justice Cassels cannot be regarded as laying down a rule to the effect that a subject can by Petition of Right claim compensation where the Crown has not taken the necessary steps required by the statute with a view to such proceedings.

Accordingly, it is clear that the landowner in question would not be able to proceed by Petition of Right for compensation upon the theory that there had been an expropriation. Even if such a course had been open to him, his claim would have been barred by the Statute of Limitation, within six years after the commencement of the regulation; (if the rule laid down by MacLean J. in *Miller* v. *the King*, 1927, Ex. C.R. p. 67, is accepted). In any event, the landowner would have been barred by the acquisition by the Crown of the flowage easement by prescription upon the expiration of twenty years of regulation.

For the information of the Court, the remedial sections of the Public Works Act of the Province of Ontario have been set forth in a note (infra p. 138). It may be observed that they provide procedure for compensation to persons whose lands are being expropriated. From the point of view of the Canadian riparian landowner, there are ample statutory methods whereby the obligation emerging on behalf of the subject from the construction and operation of the work can be satisfied. It would have been beyond the competence of the Legislature of Ontario to make legislative provision for the flowage of Minnesota lands. Accordingly, the statute cannot be construed as attempting to impose servitudes upon Minnesota lands or, correlatively, to provide compensation for the imposition of such servitudes.

The control of levels at Norman Dam, based upon statutory authority, in so far as it caused injury to land in Minnesota, was a matter for diplomacy and not for redress in the Canadian Courts. The landowner could not obtain redress by litigation, but it has already been pointed out that, as a result of international action, culminating in the Lake of the Woods Convention, 1925, he has remedies whereby he can obtain compensation, in separate proceedings, for past damages and for the imposition of a flowage easement upon his property.

Reference has been made to the effect of lapse of time upon possible remedies. The legal position in Ontario, in this respect, is set forth in the Canadian Encyclopedic Digest, Ontario, Vol. 8, at p. 521,—

> "The laws relating to prescription and the limitation of actions in force in any Province between subject and subject apply to any proceeding against the Crown in right of the Dominion in respect of any cause of action arising in such Province, subject to the provisions of any Act of the Parliament of Canada."

Further, there are many instances, in the books, of the judicial recognition of the acquisition of flowage

easements by twenty years user. For instance, in *Bowlby* v. *Woodley*, 8 U.C.Q.B. 318, it was held that the defendant, having for more than twenty years penned back waters upon the land above him by means of a dam erected on his own land, was protected by 10 and 11 Vic. c. 5, even although the land flooded by the back waters belonged to the Crown during the greater part of that period. It is true that the decisions establish that the flowage easement thus acquired after twenty years user, is limited to a right of flooding not more burdensome than that which existed throughout the period, but in this case the regime of regulation was substantially the same throughout, and there were no changes in the height of the dam or the type of regulation.

In presenting this view, it is recognized that the Crown could not obtain a flowage easement over Minnesota lands, capable of enforcement in the courts of the United States. The United States landowner's position could not be better than that of a corresponding Canadian riparian proprietor. In so far as actions in Canadian courts are concerned, his position would be governed by the laws of Canada, and the landowner would be in the same legal position as if his lands had become burdened with such an easement.

Accordingly, it is clear that the landowner in question could not present a tortious claim by Petition of Right; that he had no claim against the servant of the Crown; that he could not present the claim upon the theory that an easement had been expropriated; and that even if a remedy had existed, it would have been barred by lapse of time.

Note to Appendix "G" Setting Forth Relevant Sections of the Public Works Act Referred to Therein

(Revised Statutes of Ontario, 1897, Chap. 37.)

14. All land, streams, water-courses and property, real or personal, heretofore or hereafter acquired for the use of Public Works; all canals, locks, dams, hydraulic works, harbours, piers and other works for improving the navigation of any water; all slides, dams, piers, booms and other works for facilitating the transmission of timber; all hydraulic powers created by the construction of any Public Works; all roads and bridges; all public buildings; all railways and rolling stock thereon; all vessels, dredges, scows, tools, implements and machinery for the improvement of navigation; all drains and drainage works, and all property heretofore or hereafter acquired, constructed, repaired, maintained or improved at the expense of the Province and not under the control of the Dominion Government, shall be and remain vested in Her Majesty and under the control of the Department of Public Works. R.S.O., 1887, c. 33, s. 14.

18. Public Works hereafter constructed or completed at the expense of the Province shall, unless otherwise provided by law, be under the control of the Department and subject to the provisions of this Act. R.S.O. 1887, c. 33, s. 18.

19. The Commissioner shall direct the construction, maintenance and repair of all Public Works in progress, or constructed or maintained at the expense of the Province, and which are by this Act, or may be hereafter,

placed under the control of the Department. R.S.O. 1887, c. 33, s. 19.

29. The Commissioner of Public Works may acquire and take possession, for and in the name of Her Majesty, of any land or real estate, streams, waters, water-courses, fences and walls, the appropriation of which is in his judgment necessary or expedient for the use, construction or maintenance of any Public Work or building; or for the purpose of draining any public building, or for the sewerage service thereof; or for the use, construction or maintenance of hydraulic privileges made or created by, from or at any Public Work; or for the purpose of draining; or for the enlargement or improvement of any Public Work, or for obtaining better access thereto; or for any other public purposes authorized by the Legislature or by the Lieutenant-Governor, and to whatever Department of the Government the purpose may pertain; and the Commissioner may, for such purpose, contract with all persons, guardians, tutors, curators and trustees, whatsoever, not only for themselves, their heirs, successors and assigns, but also for and on the behalf of those whom they represent, whether infants, absentees, lunatics, or other persons otherwise incapable of contracting, possessed of or interested in such lands, real property, streams, waters and water-courses; and all such contracts, and all conveyances or other instruments made in pursuance of any such contract, shall be valid to all intents and purposes whatsoever. R.S.O. 1887, c. 33, s. 29.

WHAT CASES MAY BE REFERRED TO ARBITRATION

62. If any person has a claim for real or personal property taken, or for alleged direct or consequent damage to such property, arising from the construction or connected with the execution of a Public Work undertaken at the expense of the Province, or a claim arising

out of, or connected with, the execution or fulfilment, or on account of deductions made for the non-execution or non-fulfilment of a contract for the execution of any Public Work made and entered into with the Commissioner, either in the name of Her Majesty, or in any other manner whatsoever, such person may give notice in writing of his claim to the Commissioner, stating the particulars thereof, and how the same has arisen; and thereupon the Commissioner may, at any time within thirty days after the notice, tender what he considers a just satisfaction for the same, with notice that unless the sum so tendered is accepted in ten days after the tender, the claim will be submitted to arbitration. R.S.O. 1887, c. 33, s. 62.

63. Before a claim under this Act is arbitrated upon, the claimant shall give security to the satisfaction of the Arbitrators, or one of them, for the payment of the costs and expenses incurred by the arbitration, in the event of the claimant being awarded to pay the costs. R.S.O. 1887, c. 33, s. 63.

64. No person shall be entitled to an arbitration, where by the terms of the contract it is provided that the determination of any matters of difference arising out of or connected with the same shall be decided by the Commissioner, Architect or Engineer, or other officer of the Department. R.S.O. 1887, c. 33, s. 64.

65. No claim of any kind for compensation in respect of a contract made, or for loss or damage occasioned by anything done under this Act, by or under the authority of the Department or the Commissioner, shall be submitted to or entertained by an Arbitrator, unless the claim and the particulars thereof have been filed with the Secretary of the Department within six months next after the loss or injury complained of, or after the date of the final estimate made under such contract. R.S.O. 1887, c. 33, s. 65.

SUPREME COURT OF THE UNITED STATES.

Nos. 580, 581 and 582.—October Term, 1933.

580	Elias A. Olson, Petitioner, *vs.* The United States of America.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
581	Randor G. Karlson, Petitioner, *vs.* The United States of America.	
582	Harry Brewster, Petitioner, *vs.* The United States of America.	

[April 30, 1934.]

Mr. Justice Butler delivered the opinion of the Court.

These cases arise in a condemnation proceeding instituted by the United States in the Federal district court for Minnesota to acquire easements of flowage upon lands bordering upon the Lake of the Woods in that State. The only substantial question is whether, on the facts disclosed by the record and others of which judicial notice may be taken, the actual use and special adaptability of petitioners' shorelands for the flowage and storage of water, that *inter alia* will be available for the generation of power, may be taken into consideration in ascertaining the just compensation to which petitioners are entitled.

The superficial area of the Lake of the Woods is between fourteen and fifteen hundred square miles; it lies in Minnesota, Ontario and Manitoba. Many streams flow into it. The Rainy River and Warroad River are the largest of those touching Minnesota. The former, coming from the east along the international boundary, drains a very large territory lying on both sides of the line. The latter, not so large, coming from the south, drains a considerable area within Minnesota and empties into the southwesterly part of the lake. The outlets of the lake are in Canada; they combine to make the Winnipeg, a great river, flowing northwesterly to Lake Winnipeg. In 1898 a Canadian corporation, by agreement with the Crown, put in operation the Norman dam for the con-

trol of outflow down the Winnipeg. Since the construction of this dam, and in consequence of it and other dams in the outlets, shorelands, in disregard of the rights of owners, have been intermittently flooded for the impounding of water used in Canada for the generation of power and other purposes.

In 1909 the United States and Great Britain made a treaty which (Art. VIII) created an international joint commission and conferred upon it jurisdiction in terms broad enough to include cases involving the elevation of the Lake of the Woods as the result of these dams. 36 Stat. 2451. In 1912 questions arising out of the raising of the lake were referred to the commission and after hearings and extensive studies it made its final report in 1917. The United States and Great Britain then consummated the treaty of 1925 which provides (Article VIII): "A flowage easement shall be permitted up to elevation 1064 sea level datum upon all lands bordering on Lake of the Woods in the United States, and the United States assumes all liability to the owners of such lands for the costs of such easement".[1]

By an Act to carry into effect the provisions of the last mentioned treaty (Act of May 22, 1926, 44 Stat. 617, as amended April 18, 1928, 45 Stat. 431) Congress directed the Secretary of War to acquire by purchase or condemnation flowage easements up to the specified elevation upon all lands in Minnesota bordering

[1]Article IX provides: "The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.

"Each shall likewise assume responsibility for any damage or injury which may hereafter result to it or to its inhabitants from the regulation of the level of Lake of the Woods in the manner provided for in the present Convention."

Article X contains the following: "In consideration, however, of the undertakings of the United States as set forth in Article VIII, the Government of Canada shall pay to the Government of the United States the sum of two hundred and seventy-five thousand dollars ($275,000) in currency of the United States. Should this sum prove insufficient to cover the cost of such undertakings one-half of the excess of such cost over the said sum shall, if the expenditure be incurred within five years of the coming into force of the present Convention, be paid by the Government of Canada.

Treaty of February 24, 1925, 44 Stat. 2108.

upon the Lake of the Woods, the Warroad River and the Rainy River, and that compensation should be made in accordance with the Constitution of Minnesota which declares (Article I, § 13): "Private property shall not be taken, destroyed or damaged for public use, without just compensation therefor first paid or secured". Commissioners appointed to ascertain the damages sustained by the several owners by reason of such taking made their awards. The United States and these petitioners appealed. The cases were tried together, the jury returned verdicts for the amounts to which petitioners were found severally entitled and judgments were entered accordingly.[2] Petitioners appealed. The Circuit Court of Appeals affirmed. 67 F. (2d) 24.

At the trial petitioners sought to have just compensation ascertained on the theory that the flooding of their lands (for brevity called "use for reservoir purposes"), the circumstances which make them specially adaptable for that use and the fact that prior to condemnation such adaptability had increased their market value should be considered by the jury in determining just compensation. And, in order to establish a basis on which to rest that submission, petitioners offered to prove the following facts:

There are valuable power sites at the outlets and in the Winnipeg river which cannot be fully developed without flooding the shorelands. The industries using these waters to produce power are well established and financially responsible. Demand for electricity there produced will increase. The raising of the lake level creates a storage reservoir, of which petitioners' lands form a part,

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[2]Petitioner Olson, as stated in the condemnation petition, owns, as part of a homestead, 55.21 acres below contour 1064. He claimed $300 per acre, making in all $16,563. The commissioners awarded $1,296.50, including $40 for damage to dock and wharf. The jury's verdict was $490.

Petitioner Karlson, as stated in the condemnation petition, owns 163.65 acres below contour 1064. It lies in two parcels, one of which, 120 acres, he bought in 1921 for $175, or about $1.45 per acre. He claimed $275 per acre, or a total of about $44,000. The commissioners made but one award, $3,660. The jury's verdict was $880.

Petitioner Brewster, as stated in the condemnation petition, owns as part of his homestead 98.55 acres (exhibits indicate this should be about 156 acres) below contour 1064. Though contiguous, it is listed as three parcels. He claimed $300 per acre, making in all $46,965. The commissioners awarded $640.70 for one parcel of 32.15 acres and $3,195.80 for the remainder, about 124 acres, making in all $3,836.50. The jury's verdict for all three was $900.

that serves to increase potential capacity by about 200,000 continuous horse power which is worth more than one million dollars annually. Competition exists for the right to develop and control that capacity, the value of which is so great that one or another of the competitors would have acquired the flowage rights if the United States had not done so. It is entirely practicable for private enterprises to acquire flowage easements. Publicity, long given to the great value of the lake as a storage reservoir, created a demand and affected the market value of shorelands needed for that purpose. And, in connection with the facts above stated, petitioners offered to prove the fair market values of their lands before and after the imposition of the flowage easement, taking into consideration all the facts and circumstances affecting market prices.

Respondent, having obtained leave to establish foundation for objection to petitioners' offers to prove, introduced evidence of the following facts:

The main shore line of the Lake of the Woods, including the affected reaches of the Rainy river, exceeds 1035 miles of which more than 110 are in Minnesota. There are in the lake a number of islands of a mile or over in length and approximately 10,000 smaller ones. The shorelines of the islands exceed 1180 miles of which about 20 miles are in Minnesota. Below sea-level datum 1064, established by the treaty, there are about 850 parcels owned by more than 775 individuals. If mortgagees and other claimants are counted, the number to be dealt with is not less than 1225 persons. Of these, only 496 live on or near the land, 186 live elsewhere in Minnesota, and 123 in other parts of the United States and Canada. The addresses of 401 are unknown. The United States owns a considerable part—about one-fifth—of the shore line in Minnesota. Small areas are held under homestead entries. The State of Minnesota owns a small piece subject to contracts of sale.

And it was made to appear:

None of the 35 miles of shorelands in Manitoba, of which about 14,427 acres lie below contour 1064, are privately owned. In 1915 they were reserved by the Dominion in anticipation of action by the International Joint Commission to regulate lake levels, and in 1930 they were transferred to the Province. In Ontario more than 700 persons own shorelands. In 1920 that Province, in accordance

with the recommendations of the Commission, withdrew its lands below the established level—about 13,043 acres—from private entry. On the Canadian side about 40 Indian reservations include 8,600 acres below the established level along about 250 miles of shoreline. These lands may be disposed of only with the assent of a majority of the male members of the band of the full age of 21 years at a meeting summoned for that purpose according to the rules of the band, and subject to the approval of governmental authority.

The Lake of the Woods is one of the water communications which by the Webster-Ashburton Treaty is required to be free and open to the use of the citizens and subjects of both countries. Its usefulness for navigation is a matter of great concern. The United States is interested in navigation and in the protection of owners of shorelands on the American side rather than in the development of power in Canada. The levels controlled by dams in the outlets were regulated by Canadian authority until the creation of an international regime in pursuance of the Treaty of 1925. Regulation has not been exclusively for the production of power but, so far as practicable, for the protection of all interests, including navigation, logging, domestic use of water, irrigation and power.

The trial court, being of opinion that under the circumstances neither the use nor the special adaptability of petitioners' lands for reservoir purposes could be considered in determining their market value, excluded the evidence offered by the petitioners. He instructed the jury first to determine as to each piece of land its fair market value on May 4, 1929—before the easement was imposed—taking into consideration the fact that prior to the taking the Government had the right to maintain the level of the lake up to 1059 sea-level datum (that may be taken as the natural level); next to find the fair market value after the taking, and that the difference is the amount for which the Government is liable. To guide the jury in the ascertainment of such values, the court charged: "You will take into consideration all of the uses for which the property was available on May 4, 1929, and May 5th, 1929, and determine what use it was most valuable for, and base your award thereon; but you will not make an award based on any claim for reservoir value. I have held that under the law the value of these lands could not be based upon the use of the lake

and its shores for reservoir purposes. It is, as I understand it, conceded that the only other use for which these lands are suited, with the exception perhaps of Mr. Olson's tract, is for agricultural purposes, or purposes relating to agriculture, so that it is for those purposes that you are to value these lands". The court suggested that petitioner Olson's lands might be used for fishing purposes and instructed the jury, if it so found, to "add to the value which it might have for agricultural purposes, any added value which might accrue to it, because of its usefulness as a fishing station". Under these instructions the Government was not entitled to, and it has not claimed, lesser awards because of diminution of valne caused by the unauthorized flooding of petitioners' lands. The owners were severally entitled to the compensation then due as if no such trespass had been committed.

The rule prescribed by the Minnesota constitution is not, at least so far as concerns these cases, to be distinguished from that expressed by the just compensation clause of the Fifth Amendment and implied in the due process clause of the Fourteenth Amendment to the Federal Constitution. The judicial ascertainment of the amount that shall be paid to the owner of private property taken for public use through exertion of the sovereign power of eminent domain is always a matter of importance for, as said in *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 324: "In any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government". The statement in that opinion (p. 326) that "no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner" aptly expresses the scope of the constitutional safeguard against the uncompensated taking or use of private property for public purposes.' *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, 399.

That equivalent is the market value of the property at the time of the taking contemporaneously paid in money. *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 306. *Jacobs* v. *United States,* 290 U. S. 1, 17. 2 Lewis, Eminent Domain, 3rd ed., § 682, p. 1172. It may be more or less than the owner's investment. He may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have

changed substantially while held by him. The return yielded may have been greater or less than interest, taxes and other carrying charges. The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner's bargain. *Vogelstein & Co.* v. *United States*, 262 U. S. 337, 340. He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and federal constitutions. *The Minnesota Rate Cases*, 230 U. S. 352, 454.

Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. *Boom Co.* v. *Patterson*, 98 U. S. 403, 408. *Clark's Ferry Bridge Co.* v. *Public Service Commission*, 291 U. S. —, —. 2 Lewis, Eminent Domain, 3rd ed., § 707, p. 1233. 1 Nichols, Eminent Domain, 2d ed., § 220, p. 671. The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value. Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use in the public service. *New York* v. *Sage*, 239 U. S. 57, 61. It is common knowledge that public service corporations and others having that power frequently are actual or potential competitors not only for tracts held in single ownership but also for rights of way, locations, sites and other areas requiring the union of numerous parcels held by different owners. And, to the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account. *Boom Co.* v. *Patterson*, *ubi supra*. But the value to be ascertained does not include, and the owner is not entitled to compensation for, any element resulting subsequently to